

No. 87-1387-CFX  
Status: GRANTED

Title: Wards Cove Packing Company, Inc., et al.,  
Petitioners  
v.  
Frank Atonio, et al.

Docketed:  
February 9, 1988

Court: United States Court of Appeals  
for the Ninth Circuit

Vide:

Counsel for petitioner: Fryer, Douglas  
Counsel for respondent: Arditi, Abraham A.

Entry	Date	Note	Proceedings and Orders
1	Feb 9 1988	G	Petition for writ of certiorari filed.
2	Mar 11 1988		Brief of respondent Frank Antonio, et al. in opposition filed.
3	Mar 16 1988		DISTRIBUTED. April 1, 1988
5	Jun 24 1988		REDISTRIBUTED. June 29, 1988
6	Jun 30 1988		Petition GRANTED. limited to Questions 1, 2, and 3 presented by the petition.
			*****
8	Jul 12 1988		Order extending time to file brief of petitioner on the merits until September 10, 1988.
9	Aug 29 1988		Record filed.
		*	Certified copy of original record and proceedings, volumes 1-54, 6 boxes and 1 envelope, recieved.
10	Sep 9 1988		Brief amicus curiae of Center for Civil Rights filed.
11	Sep 9 1988		Brief amicus curiae of American Society for Personnel Administration filed.
12	Sep 9 1988		Brief amicus curiae of United States filed.
13	Sep 9 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
14	Sep 9 1988		Brief amicus curiae of Chamber of Commerce for the United States filed.
15	Sep 10 1988		Joint appendix filed.
16	Sep 10 1988		Brief of petitioner Wards Cove Packing Co., Inc. filed.
17	Sep 13 1988		Lodging recieved. (12 binders - box).
19	Sep 13 1988		Order extending time to file brief of respondent on the merits until November 5, 1988.
20	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 18, 1989. (4th case) (1 hr.)
21	Nov 4 1988		Brief amici curiae of ACLU, et al. filed.
22	Nov 4 1988		Brief amici curiae of NAACP Legal Defense, et al. filed.
23	Nov 4 1988		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
24	Nov 4 1988		Brief amicus curiae of NAACP filed.
25	Nov 5 1988		Brief of respondents Frank Atonio, et al. filed.
26	Nov 22 1988		CIRCULATED.
27	Dec 2 1988		Lodging received. (10 copies).
28	Dec 5 1988	X	Reply brief of petitioner Wards Cove Packing Co., Inc. filed.
29	Jan 18 1989		ARGUED.



87-1387

Supreme Court, U.S.

FILED

FEB 9 1988

No. \_\_\_\_\_

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
Supreme Court of the United States

October Term, 1987

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ.  
WELLS & FRYER  
Suite 3300  
1001 Fourth Avenue Plaza  
Seattle, Washington 98154  
(206) 623-5890

*Attorneys for Petitioners*

\* Counsel of Record

February 9, 1988

341

## QUESTIONS PRESENTED

1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not underrepresented in the at-issue jobs?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly alter the burdens of proof and engage in impermissible fact-finding in disregard of established precedent of this Court?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of alleged employment practices under the disparate impact model?

4. Was it error for the Ninth Circuit to expand the reach of the disparate impact theory to employment practices such as word of mouth recruiting, subjective application of hiring criteria, and other practices that do not operate as "automatic disqualifiers?"

## LIST OF PARTIES

Petitioners are Wards Cove Packing Co., Inc., and Castle & Cooke, Inc., who were defendants in the trial court proceeding. (Claims against a third defendant, Columbia Wards Fisheries, were dismissed. This was affirmed on appeal. *See* fn. 2 *infra*.)

Respondents are Frank Atonio, Eugene Bacilig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Joaquin Arruiza, and Barbara Viernes (as administratrix of the Estate of Gene Allen Viernes), who were individual plaintiffs and representatives of a class of all nonwhite employees in the trial court proceeding.

### Rule 28.1 disclosure:

Wards Cove Packing Company, Inc. is a privately-held domestic corporation.  
Castle & Cooke, Inc. is a publicly-held and traded domestic corporation.

## TABLE OF CONTENTS

	<u>Page</u>
Questions Presented .....	i
List of Parties .....	ii
Table of Contents .....	iii
List of Authorities .....	vi
Opinions Below .....	1
Jurisdiction .....	2
Pertinent Statute .....	2
Statement of The Case .....	3
A. Nature of the Case .....	3
B. Material Facts .....	4
C. Court of Appeals Rulings .....	6
Reasons for Granting the Petition .....	8
I. The Simplistic Notion That Racial Imbalance Can Establish Disparate Impact in the Face of Findings That Minorities Are Not Underrepresented in the Jobs at Issue is Not Supported By the Decisions of This Court and is Rejected by Several Other Circuits; is a Fundamental Misconception of the Role of Statistics in Proving Discrimination; Has Far-Reaching, Ominous Implications for Employers; and Is Out of Step With the Congressional Policy of Title VII of the Civil Rights Act of 1964. ....	8

## TABLE OF CONTENTS, (continued)

	<u>Page</u>
II. The Ninth Circuit's Application of the Disparate Impact Theory Represents a Radical Departure from Established Precedent of This Court, and Threatens to Revolutionize the Allocation of Proof in Discrimination Suits. ....	11
A. In Reaching for a Basis to Vacate the District Court's Judgment, the Ninth Circuit Has Ignored Prior Precedent of This Court and the Trial Court's Findings. ....	11
B. The Ninth Circuit Decision is a Revolutionary Departure from the Established Rules for the Allocation of Proof in a Discrimination Case. . .	13
1. New Allocation of Proof. ....	13
2. Hiring Criteria. ....	15
3. Sources of Employees. ....	16
III. Allowing Plaintiffs to Challenge an Entire Range of "Named" Employment Practices Merely Because the Employers' Work Force Reflects Uneven Racial Balance Is an Improper Application of the Disparate Impact Model, Places an Unfair Burden on the Employer, and Exacerbates an Existing Conflict of Authority in the Circuits. ....	18

## TABLE OF CONTENTS, (continued)

	<u>Page</u>
IV. There is a Substantial Conflict in the Circuits as to Whether the Disparate Impact Analysis May Be Applied to Subjective Decision Making and Other Practices That Do Not Act as "Automatic Disqualifiers." ....	21
Conclusion. ....	22
Appendices:	
Appendix I: . . . . .	I-1
Appendix II: . . . . .	II-1
Appendix III: . . . . .	III-1
Appendix IV: . . . . .	IV-1
Appendix V: . . . . .	V-1
Appendix VI: . . . . .	VI-1
Appendix VII: . . . . .	VII-1
Appendix VIII: . . . . .	VIII-1
Appendix IX: . . . . .	IX-1



## TABLE OF AUTHORITIES

Table of Cases	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) . . . . .	13
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) . . . . .	11,12
<i>Bunch v. Bullard</i> , 795 F.2d 384 (5th Cir. 1986) . . . . .	22
<i>Clark v. Chrysler Corp.</i> , 673 F.2d 921 (7th Cir. 1982) . . . . .	9,10,17
<i>Coser v. Moore</i> , 739 F.2d 746 (2d Cir. 1984) . . . . .	10
<i>De Medina v. Reinhardt</i> , 686 F.2d 997 (D.C. Cir. 1982) . . . . .	9
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) . . . . .	11,15
<i>EEOC v. American Nat'l Bank</i> , 652 F.2d 1176 (4th Cir. 1981) . . . . .	11
<i>EEOC v. Federal Reserve Bank of Richmond</i> , 698 F.2d 633 (4th Cir. 1983), <i>rev'd on other grounds, sub nom, Cooper v. Federal Reserve Bank of Richmond</i> , 467 U.S. 867 (1984) . . . . .	9,10,22
<i>Freeman v. Lewis</i> , 675 F.2d 398 (D.C. Cir. 1982) . . . . .	13
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) . . . . .	18
<i>Griffin v. Board of Regents</i> , 795 F.2d 1281 (7th Cir. 1986) . . . . .	22
<i>Griffin v. Carlin</i> , 755 F.2d 1516 (11th Cir. 1985) . . . . .	13,15,19,21
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) . . . . .	15
<i>Hammon v. Barry</i> , 826 F.2d 73 (D.C. Cir. 1987) . . . . .	9,20

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	Page
<i>Harris v. Ford Motor Co.</i> , 651 F.2d 609 (8th Cir. 1981) . . . . .	22
<i>Hawkins v. Bounds</i> , 752 F.2d 500 (10th Cir. 1985) . . . . .	21
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977) . . . . .	9,10
<i>Hilton v. Wyman-Gordon Co.</i> , 624 F.2d 379 (1st Cir. 1980) . . . . .	9,10,19,20
<i>Johnson v. Transp. Agency</i> , 480 U.S.____, 94 L. Ed. 2d 615 (1987) . . . . .	9,18
<i>Johnson v. Uncle Ben's, Inc.</i> , 628 F.2d 419 (5th Cir. 1980) . . . . .	9,10
<i>Markey v. Tenneco</i> , 707 F.2d 172 (5th Cir. 1983) . . . . .	17
<i>McNeil v. McDonough</i> , 648 F.2d 178 (3rd Cir. 1981) . . . . .	13
<i>Pegues v. Mississippi State Employment Serv.</i> , 699 F.2d 760 (5th Cir.), <i>cert. denied</i> , 464 U.S. 991 (1983) . . . . .	22
<i>Pouncy v. Prudential Ins.</i> , 668 F.2d 795 (5th Cir. 1982) . . . . .	11,19,20,22
<i>Pope v. City of Hickory</i> , 679 F.2d 20 (4th Cir. 1982) . . . . .	22
<i>Rivera v. City of Wichita Falls</i> , 665 F.2d 531 (5th Cir. 1982) . . . . .	9,10,19
<i>Robins v. White-Wilson Medical Clinic</i> , 642 F.2d 153 (5th Cir. 1981) . . . . .	13

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	<u>Page</u>
<i>Robinson v. Polaroid Corp.</i> , 732 F.2d 1010 (1st Cir. 1984) . . .	14,19
<i>Rowe v. Cleveland Pneumatic Co.</i> , 690 F.2d 88 (6th Cir. 1982) . . . . .	21
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984), <i>cert. denied sub nom, Meese v. Segar</i> , 471 U.S. 1115 (1985) . . . . .	13,14,21-22
<i>Shidaker v. Carlin</i> , 782 F.2d 746 (7th Cir. 1986) . . . . .	11
<i>Ste. Marie v. Eastern R. Assoc.</i> , 650 F.2d 395 (2d Cir. 1981) . . . . .	10,13,19
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) . . . . .	8
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) . . . . .	13,14,15,18
<i>United States v. Ironworkers Local 86</i> , 443 F.2d 544 (9th Cir.), <i>cert. denied</i> , 404 U.S. 984 (1971) . . . . .	17
<i>Vuyanich v. Republic Nat'l Bank of Dallas</i> , 723 F.2d 1195 (5th Cir. 1984), <i>cert. denied</i> , 469 U.S. 1073 (1984) . . . . .	22
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 798 F.2d 791 (5th Cir. 1986) . . . . .	22

## TABLE OF AUTHORITIES, (continued)

Statutes	<u>Page</u>
Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . . .	3
Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) . . . . .	2-3,8,20
28 U.S.C. § 1254(1) . . . . .	2
28 U.S.C. § 1331 . . . . .	2
28 U.S.C. § 2101(c) . . . . .	2
<b>Other Authorities</b>	
B. Schlei & P. Grossman, <i>Employment Discrimination Law</i> (2d ed. 1983) . . . . .	11
<b>Miscellaneous</b>	
<i>Webster's Third New International Dictionary of the English Language Unabridged</i> . . . . .	12

IN THE  
**Supreme Court of the United States**

---

October Term, 1987

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**OPINIONS BELOW**

On October 31, 1983, the United States District Court for the Western District of Washington (Quackenbush, J.) entered an opinion following a nonjury trial. Appendix I. An order correcting the opinion and judgment in favor of petitioners was entered December 6, 1983. App. II. The trial court's decision was published at 34 E.P.D. ¶34,347 (Commerce Clearing House, Inc.). The opinion of the Court of Appeals affirming the judgment was published at 768 F.2d 1120. App. III. An order that withdrew the opinion and ordered rehearing *en banc* was published at 787 F.2d 462. App. IV. An opinion of the *en banc* Court of Appeals was published at 810 F.2d 477. App. V. A second opinion of the original panel of the Court

of Appeals on remand from the *en banc* court was published at 827 F.2d 439. App. VI. On November 12, 1987 an order clarifying the opinion was entered. App. VIII, and a petition for rehearing denied. App. IX.<sup>1</sup>

### JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. § 1331. The decision of the Court of Appeals sought to be reviewed was entered on September 2, 1987. App. VI. A timely petition for rehearing was filed on September 16, 1987, App. VII, and the petition was denied on November 12, 1987. App. IX. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely under 28 U.S.C. § 2101(c).

### PERTINENT STATUTE

Plaintiffs' claims arise under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

<sup>1</sup> In addition, the plaintiffs took two interlocutory appeals: One unpublished opinion, affirming a denial of a motion for preliminary injunction and another affirming in part and reversing in part a dismissal of Title VII claims. 703 F.2d 329.

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

### STATEMENT OF THE CASE

#### A. Nature of the Case.

The named plaintiffs in this class-action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, petitioners Wards Cove Packing Company, Inc., and Castle & Cooke, Inc.,<sup>2</sup> charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will, be, or have been at any time since March 20, 1971, employed at any one of five canneries.

Following a lengthy non-jury trial, the trial court found that plaintiffs had not established discrimination under § 1981 or Title VII and judgment was entered for petitioners. The Ninth Circuit affirmed this decision, but on rehearing *en banc* resolved a conflict within the circuit by determining that the impact analysis could be applied to subjective employment practices and remanded to the original panel. The subsequent panel decision vacated the judgment and remanded to the district court with directions to apply the disparate impact analysis in a manner inconsistent with decisions of this Court and in conflict with other circuits.

<sup>2</sup> Claims against Columbia Wards Fisheries, an additional defendant, were dismissed. *Atonio v. Wards Cove Packing Co., Inc.*, 703 F.2d 329 (9th Cir. 1983); *also see* App. III-13-15 and App. VIII.



## B. Material Facts.

Petitioners operate salmon canneries in remote and widely separated areas of Alaska. Of eleven facilities, five were certified for this class action. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Petitioners' head office and support facilities are located at Seattle, Washington, and Astoria, Oregon.

The employment needs to operate the canneries will vary with the size and duration of the salmon runs. Petitioners hire employees primarily from the Pacific Northwest and Alaska. The bulk of employees are "cannery workers," who work in the cannery itself on the fish processing, canning lines. Local 37 of the I.L.W.U. has jurisdiction and a contract for these jobs. The remaining jobs at the cannery are carpenters, machinists, tender crews, longshoremen, administrative, and other support personnel. It is these non-cannery worker jobs which are at issue. The non-cannery worker jobs are covered by several union contracts. Some are non-union. The trial court's opinion sets forth the facts in detail. (App. I; *see also* the background discussion in first panel opinion at App. III-3-12.)

Petitioners hire all employees except those persons working on the cannery line (cannery workers) from an external labor market which is 10% nonwhite. For the positions at issue, nonwhites filled 21% of the at-issue jobs at the class canneries and approximately 24% in petitioners' overall Alaska operations. Cannery workers, on the other hand, were hired through Local 37 of the I.L.W.U. The composition of Local 37 is dominated by Filipinos, as are the crews it dispatches to the canneries each summer. In addition, petitioners filled some cannery worker jobs for some of the more remote canneries from local populations.

In 1974 plaintiffs commenced a class action against petitioners. The suit mounted a broad-scale attack against the

gamut of petitioners' employment practices. Plaintiffs identified 16 "practices"<sup>3</sup> which they contended caused an imbalance and thus a "concentration" of nonwhites in the lower-paying cannery worker jobs. Plaintiffs used comparative statistics to argue that of the total work force, the majority of the nonwhites were concentrated in the lower-paying jobs and that there should have been a balance of 50% white/nonwhite employees in all job classifications.

After 12 trial days, in which more than 100 witnesses testified, over 900 exhibits were admitted, and over 1,000 statistical tables were submitted, the trial court entered extensive findings of fact in a 73-page opinion. App. I. The findings determined that plaintiffs' comparative statistics were of little probative value; that the labor supply for petitioners' facilities is 90% white; that minorities were not underrepresented in the at-issue jobs; that cannery workers are not the appropriate comparison labor pool for at-issue jobs; that petitioners hire from an external labor supply and do not either promote-from-within or train inexperienced, unskilled workers for at-issue jobs; that most jobs at issue require skill and prior experience that is not readily acquirable at the canneries; that Local 37 provides an oversupply of nonwhite cannery workers and that this overrepresentation is an institutional factor in the industry.<sup>4</sup>

In addition, the trial court found that no individual instances of discrimination were proven; that petitioners did not give job preference to friends and relatives; that plaintiffs'

<sup>3</sup> The 16 practices were word-of-mouth recruitment, separate hiring channels, nepotism, termination of Alaska natives, rehire preference, retaliatory terminations, menial work assignments, fraternization restrictions, housing, messing, English language requirement, race labeling, subjective hiring criteria, lack of formal promotion practices, failure to post openings, and discrimination in pay in certain jobs.

<sup>4</sup> None of these findings were challenged on appeal.

"nepotism" statistics were distorted and unreliable; that hiring was on the basis of job-related criteria; that hiring of experienced personnel was a business necessity; that the rehire preference clauses in the union contracts operated like a seniority system; that housing is not racially segregated, and that housing, rehire, and messing policies were all dictated by business necessity.

The trial court found that plaintiffs had failed to establish intentional discrimination and the disparate impact analysis was not appropriate for application to plaintiff's wide-ranging multiple practice challenge nor to subjective hiring practices. In applying the impact analysis individually to five of petitioners' practices (rehire preference, English language, "nepotism," housing, and messing), the district court again found in favor of petitioners.

### C. Court of Appeals Rulings.

On appeal a panel of the Ninth Circuit affirmed the judgment, noting, however, that there was a conflict in the decisions of several circuits and the Ninth Circuit itself as to whether the disparate impact analysis could be applied to analyze "subjective practices." 768 F.2d 1120 (9th Cir. 1985), App. III. This opinion was withdrawn after rehearing *en banc* was granted. 787 F.2d 462 (9th Cir. 1985), App. IV. On *en banc* rehearing, the Ninth Circuit held that the disparate impact analysis could be applied to such practices. 810 F.2d 477 (9th Cir. 1987), App. V. The case was then remanded to the original panel which sought to apply the impact analysis to eight of the 16 "practices" identified by plaintiffs.<sup>5</sup> 827 F.2d 439 (9th Cir. 1987), App. VI.

<sup>5</sup> The practices selected by the panel were subjective hiring criteria, word-of-mouth-recruitment, nepotism, separate hiring channels, rehire preferences, housing, messing, and labeling. The Ninth Circuit does not explain why these were selected nor what disposition was made, if any, of the other eight practices alleged to have caused the "imbalance" in hiring.

On remand the Court of Appeals panel affirmed the district court on the rehire preference, did not discuss the English language requirement, but held that plaintiffs' "comparative statistics," which showed only a concentration of minorities in the cannery worker jobs, were nonetheless adequate to require the district court to examine petitioners' hiring practices on grounds of business necessity. In doing so, the Court of Appeals did not hold that any practice caused disparate impact,<sup>6</sup> and ignored the district court's findings that plaintiffs' statistics were distorted and unreliable, that petitioners hired more nonwhites than the proportion available in the labor supply, and that institutional factors, not the petitioners' practice, caused an overrepresentation of minorities in cannery worker jobs.

The court also held, contrary to trial court findings, that a preference for relatives ("nepotism") existed and had an adverse impact on nonwhites. Finally, the court questioned the district court's finding of business necessity for petitioners' housing and messing practices. The Court of Appeals vacated judgment for petitioners and remanded.

<sup>6</sup> The Ninth Circuit implied that petitioners "conceded" causation and did not argue no impact was shown. 827 F.2d at 446, 447. This is not true. Proof of causation and impact is plaintiffs' burden and petitioners have maintained throughout that plaintiffs failed to meet their burden on both.



## REASONS FOR GRANTING THE PETITION

This case raises fundamental questions as to the boundaries of the disparate impact theory under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and as to the role of statistics and the allocation of proof under that theory. The Ninth Circuit's decision, in direct conflict with several other circuits, effectively allows a plaintiff to shift the burden of proof to an employer by establishing only that the employer's work force has an uneven racial balance. To reach this extraordinary conclusion, the Court of Appeals had to disregard established precedent of this Court and other circuits, invent new rules for allocation of proof, and totally ignore the trial court's key findings of fact and the petitioners' evidence.

This petition should be granted because only this court can answer the questions raised, resolve the conflicts created, and rectify the wrong that has been done to petitioners.

- I. The Simplistic Notion That Racial Imbalance Can Establish Disparate Impact in the Face of Findings That Minorities Are Not Underrepresented in the Jobs at Issue is Not Supported By the Decisions of This Court and is Rejected by Several Other Circuits; is a Fundamental Misconception of the Role of Statistics in Proving Discrimination; Has Far-Reaching, Ominous Implications for Employers; and Is Out of Step With the Congressional Policy of Title VII of the Civil Rights Act of 1964.**

The Ninth Circuit gave plaintiffs' comparative internal work force statistics decisive weight in vacating the trial court's judgment for the employers. *Id.*, 827 F.2d at 444-447 (App. VI, pp. 14-18). However, in doing so the Court of Appeals ignored the admonition of this court that the usefulness of statistics "depends on all of the surrounding facts and other circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977). It also ignored the unchallenged findings of the trial court on the labor market.

In failing to recognize the significance of the findings, particularly as to the labor market, the Ninth Circuit committed serious error. The decision is in direct conflict with *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) and *Johnson v. Transp. Agency*, 480 U.S.\_\_\_\_, 94 L. Ed. 2d 615 (1987), which hold that where at issue jobs are filled from outside the employer's own work force, it is appropriate to focus on the racial composition of the relevant external labor market and statistically compare it to the employer's actual hiring.<sup>7</sup> The post-*Hazelwood* circuit court opinions agree. *E.g.*, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 425 (5th Cir. 1980); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 544-45 (5th Cir. 1982); *De Medina v. Reinhardt*, 686 F.2d 997, 1004-1009 (D.C. Cir. 1982); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 658-62 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). See *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 380 (1st Cir. 1980) (plaintiff's "concentration" evidence rebutted by outside labor force statistics); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982) (any showing of impact refuted by external labor market statistics). *Cf. Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (improper to adopt affirmative action plan where minorities not underrepresented in comparison to area labor force). The Ninth Circuit did not mention, discuss, or heed these decisions.

In effect, what the Ninth Circuit has done is hold that a mere internal work force showing of "concentration" of minorities, without regard to the factual circumstances, is sufficient to establish the disparate impact of the amalgam of practices plaintiffs choose to name. This is a direct conflict

<sup>7</sup> At trial both parties recognized that establishment of the most reasonable proxy for the pool of potential applicants was necessary. *Hazelwood v. United States*, 433 U.S. 200 (1977). Both offered expert and statistical evidence on the labor market and the trial court found petitioners' evidence more probative.

with at least four other circuits whose post-*Hazelwood* decisions hold (1) internal work force comparisons are relevant, if at all, only in a promotion case or where the employer trains its workers for promotion and then, only if plaintiff focuses on the *qualified* segment of the promotion pool, *Johnson v. Uncle Ben's, Inc.*, *supra*, 628 F.2d at 425 (5th Cir.); *Ste. Marie v. Eastern R. Assoc.*, 650 F.2d 395, 400 (2d Cir. 1981); *EEOC v. Federal Reserve Bank of Richmond*, *supra*, 698 F.2d at 659-60 (4th Cir.); *Rivera*, *supra*, 665 F.2d at 541, n.16 (5th Cir.); and (2) that a showing of concentration in a hiring case will be refuted by external labor market evidence that shows no underrepresentation of minorities, *Hilton*, *supra*, 624 F.2d at 380; *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *EEOC v. Federal Reserve Bank of Richmond*, *supra*, 698 F.2d at 658-62 (4th Cir.); *Rivera*, *supra*, 665 F.2d at 539, 544-45 (5th Cir.). See *Clark*, *supra*, 673 F.2d at 929 (external labor market data showed no impact in hiring).

The foregoing decisions stand for the proposition that plaintiffs cannot establish a disparate impact in hiring for jobs at issue with statistical evidence that shows only a concentration of minorities in jobs not at issue, where the employer has hired minorities in their proportion to the labor market and hires from an external, not internal, labor pool. The Ninth Circuit disagrees, but it stands alone in that disagreement.

The Ninth Circuit is geographically the largest court of appeals circuit in America. To allow this fundamentally erroneous view of the role of statistical proof exposes every employer in the West that does not have an "even" racial balance in all of its jobs to the threat of litigation and the risk of liability, regardless of the particular circumstances of their businesses. As discussed below, this is not what Congress intended nor do the logical implications of this decision carry out the spirit or the letter of Title VII. See III, *infra*.

## II. The Ninth Circuit's Application of the Disparate Impact Theory Represents a Radical Departure from Established Precedent of This Court, and Threatens to Revolutionize the Allocation of Proof in Discrimination Suits.

### A. In Reaching for a Basis to Vacate the District Court's Judgment, the Ninth Circuit Has Ignored Prior Precedent of This Court and the Trial Court's Findings.

First, as pointed out above, the Ninth Circuit did not consider the trial court's finding as to the probative value of petitioners' statistical evidence. This was a finding of fact, was not clearly erroneous, and should not have been ignored. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The Ninth Circuit could not have reached its decision without avoiding this finding and in doing so, it violated the first principle of appellate decision-making.

Second, it is clear that before the burden is shifted to the employer in an impact case to prove job relatedness or business necessity, the court must evaluate both petitioners' attacks on plaintiffs' evidence and *petitioners' own rebuttal evidence*. *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977) (Rehnquist, J., concurring); *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981); *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800-801, n.8 (5th Cir. 1982); *Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir. 1986). See B. Schlei & P. Grossman, *Employment Discrimination Law*, pp. 1325-26 (2d ed. 1983); p. 159, n.75 (suppl. 1984). The Ninth Circuit did not take into account, discuss, or even mention petitioners' labor market evidence, statistical proof, or other evidence showing that the factual setting rendered plaintiffs' comparative statistics virtually irrelevant.



Plaintiffs allege that petitioners utilized a practice of "nepotism" in filling job openings. This term is defined as "favoritism shown to . . . relatives as by giving them positions because of their relationship rather than on their merits." *Webster's Third New International Dictionary of the English Language Unabridged*, p. 1518. The trial court found that although relatives were hired, they were *not* hired because of that relationship, they were hired because they were skilled and qualified. App. I-105-122. The district court found that *no preference for relatives existed*. In other words, nepotism was not established. Despite accepting the trial court's findings (see App. VI-20-21), the Ninth Circuit found that the practice of nepotism existed. 827 F.2d at 445. Moreover, the Ninth Circuit found that there were 349 "nepotistic hires" during 1970-1975. *Id.*<sup>8</sup> The statistics come from tables prepared by plaintiffs that simply listed employees who were related. These tables were rejected by the trial court. App. I-105.<sup>9</sup> Plaintiffs attempted to prove that the fact relatives were hired demonstrated they were hired *because* they were relatives. The trial court found otherwise. This finding was not clearly erroneous.

Finally, as to housing and messing practices, the trial court found that even if it applied the impact analysis, the practices were justified by business necessity. This finding was not clearly erroneous and should not have been vacated by the Ninth Circuit under the rule of *Anderson v. Bessemer City*, *supra*.

<sup>8</sup> The Ninth Circuit panel's finding is even more curious when one recalls that this same panel had previously found that nepotism did *not* exist. See 768 F.2d at 1126, 1133 (App. III-22-23, 56).

<sup>9</sup> There were numerous methodological problems with plaintiffs' so-called "nepotism tables." A principal flaw was that they included gross over-counting of employees and improperly treated some persons as related.

*B. The Ninth Circuit Decision is a Revolutionary Departure from the Established Rules for the Allocation of Proof in a Discrimination Case.*

*1. New Allocation of Proof.*

The Ninth Circuit has invented a wholly unprecedented rule for cases that are tried under both the treatment and impact analysis. The Ninth Circuit held that since petitioners had, in their rebuttal to plaintiffs' treatment case, offered to "explain the disparity,"<sup>10</sup> they were *precluded* from challenging plaintiffs' *impact* showing. App. VI-5. There is absolutely no Supreme Court precedent supporting this holding. The only decision cited by the Ninth Circuit is *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Albemarle* held that if the plaintiff has *established* disparate impact of an employment test, the employer must prove the job relatedness of that test. It did *not* hold that the employer was precluded from showing that there was no impact; nor did it hold that the employer was precluded from attacking plaintiffs' evidence purporting to show impact.

In effect, what the Ninth Circuit has done with this new "rule" is to avoid the clear burden of proof requirements in a treatment case set forth by this court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and followed by the majority of other circuits thereafter.<sup>11</sup> *Burdine* holds that once a plaintiff has established a *prima facie* treatment case, the employer may defend by articulating — not

<sup>10</sup> By attacking plaintiffs' statistics and by establishing the proper labor market, petitioners proved no disparity existed. In addition, petitioners articulated nondiscriminatory reasons for their conduct.

<sup>11</sup> *E.g.*, *St. Marie v. Eastern R. Ass'n*, 650 F.2d 395 (2d Cir. 1981); *McNeil v. McDonough*, 648 F.2d 178 (3d Cir. 1981); *Robins v. White-Wilson Medical Clinic*, 642 F.2d 153 (5th Cir. 1981). *But see Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. den. sub nom. Meese v. Segar*, 471 U.S. 1115 (1985) and *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985).

proving — a legitimate nondiscriminatory reason for his action. 450 U.S. at 258.<sup>12</sup> The Ninth Circuit seems to hold that once the reason is articulated the employer may no longer attack plaintiffs' statistics and prove lack of disparate impact; further, the employer must now not only articulate, he must prove the business necessity of the reason. The result of this new rule is to emasculate *Burdine* and make it impossible for an employer to defend a treatment case by articulating a reason for his action, unless he is prepared to prove the business necessity of the practice.

Combined with its holding that the proof necessary to establish a *prima facie* case under the treatment and impact theories is identical<sup>13</sup> (App. VI-4-5), the Ninth Circuit has effectively held that burden of proof is shifted to the employer if plaintiffs meet the "not onerous" burden<sup>14</sup> of establishing a *prima facie* treatment case.

A case cited that could support the Ninth Circuit's holding on the burden of proof is *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). *Segar* also involved a disparate treatment attack on the cumulative effect of many alleged practices. The District of Columbia Circuit held that if an employer defends by articulating the reason for his conduct, he must identify which of the practices causes the disparity and then prove the business necessity of the practice.<sup>15</sup> *Segar* was followed by the Eleventh

<sup>12</sup> While the Ninth Circuit paid lip service to this requirement, it simply avoided it by equating "articulation" in a treatment case with an admission of impact and of causation in an impact case.

<sup>13</sup> A holding that has little or no support and conflicts with *Robinson v. Polaroid*, 732 F.2d 1010 (1st Cir. 1984) (plaintiff established *prima facie* treatment case but not impact case).

<sup>14</sup> *Burdine, supra*, 450 U.S. at 253.

<sup>15</sup> In *Segar*, the employer explained his conduct, as is allowed by *Burdine*, but did not refute the statistical disparity. Here, (footnote continued on next page)

Circuit in *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985). No other circuits appear to have deviated from *Burdine*.

## 2. Hiring Criteria.

In applying the impact theory to hiring criteria, the Ninth Circuit also altered the burdens of proof and ignored the district court's findings. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) requires that if the plaintiff wishes to challenge a hiring criterion as having a disparate impact, he must prove that *criterion* causes the impact. In *Griggs*, plaintiffs established the disparate impact of a high school diploma requirement with un rebutted evidence that a disproportionately smaller percentage of blacks had diplomas. 401 U.S. at 430, n.6. In *Dothard, supra*, plaintiff's established the disparate impact of a height and weight requirement by showing that a disproportionate number of women were less than 5'2" feet tall and 120 lbs. 433 U.S. at 429-30. In neither case would the plaintiffs have been allowed to establish an impact case by simply *alleging* the practice was discriminatory without independent evidence that the qualification *had* an impact.

Yet, this is precisely what the Ninth Circuit has done here. It held that since plaintiffs "challenged" petitioners' hiring criteria, they were *not* required to take those criteria into account. App. VI-17, 27. Plaintiffs chose not to do so,<sup>16</sup> both in their labor market statistics and in their internal compara-

defendant did both: explained the facts that rebutted plaintiffs' *prima facie* showing (e.g., that defendants hired from an external, not internal, labor pool; that Local 37 dispatched a gross overrepresentation of nonwhites), attacked the reliability of plaintiffs' statistics, and offered their *own* statistics that showed nonwhites were not underrepresented in the at-issue jobs.

<sup>16</sup> Plaintiffs chose instead to rely on their argument that virtually all of the at-issue jobs did not require prior skills, experience, or other qualifications. The trial court found otherwise and plaintiffs offered no evidence that took the trial court's findings into account.



tive statistics. They did so at their peril, because the trial court *did* find that employers hired on the basis of job-related criteria. App. I-45-75, 122.

It is not surprising that plaintiffs chose not to account for even the most basic qualifications of the "proxy" population. *Petitioners'* did so with their labor market analysis and it established that qualified nonwhite availability was closer to 10% than to the 50% argued by plaintiffs.

In its discussion of hiring criteria, the Ninth Circuit stated that it was *petitioners'* burden to prove the qualified nonwhite component in the labor market (App. VI-17, 26), but then ignored *petitioners'* evidence doing just that. Instead of addressing *petitioners'* evidence that showed not only the qualified nonwhite component in the labor market, but that nonwhites were not underrepresented in the at-issue jobs, the Ninth Circuit skipped over this evidence and held that the employers were first required to *prove job relatedness* of the criteria plaintiffs were challenging. Again, this is a totally inappropriate shifting of the burden of proof. Combined with its inappropriate crediting of plaintiffs' statistics, this means that a plaintiff can simply allege that there is an "imbalance" between two job categories (*i.e.*, something other than 50/50), "allege" that any qualifications required by the employer are discriminatory, and thereby force on the employer the burden of proving the job relatedness of its criteria without plaintiff ever having to make the threshold showing of impact of the qualification at issue.

### 3. Sources of Employees.

The Ninth Circuit's allocation of the burden of proof in its treatment of the "hiring channels" and the word-of-mouth recruitment issues is particularly disturbing in light of the actual facts in this case. The Court of Appeals seems to conclude that plaintiffs' comparative statistics combined with

word-of-mouth recruiting<sup>17</sup> was "discriminatory." App. VI-28-29. No court has held that word-of-mouth recruiting is *per se* discriminatory; the court must look first at the results of that practice. See *Markey v. Tenneco*, 707 F.2d 172 (5th Cir. 1983) and *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982), both of which hold that the employer can defeat an attack on word-of-mouth recruiting by establishing that the resultant hiring is in line with the external labor market. Even the *Ironworkers Local 86* case cited by the Ninth Circuit<sup>18</sup> did not conclude that plaintiffs had established their case without examination of the *unrebutted* stark racial statistics and the evidence as to racial composition of the local population. The Ninth Circuit did not do so here. To reach its conclusion on these practices, the Ninth Circuit not only ignored the trial court's findings, it committed plain error in concluding that the companies *did not argue* the practices had "no impact." App. VI-30. (This error was pointed out in the Petition for Rehearing, App. VII.)

The Ninth Circuit then placed the burden of proof on the *petitioners* to establish why they *did not* hire for the at-issue jobs through different sources. App. VI-30.<sup>19</sup> In forcing

<sup>17</sup> Word-of-mouth recruiting, the practice selected by the Ninth Circuit for consideration, was only one method by which potential employees came to the attention of management. For instance, the record also demonstrates that walk-in applicants and referrals from other unions having jurisdiction over the at-issue jobs were used. The trial court found that the company got far more applications than there were available non-cannery worker jobs.

<sup>18</sup> *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir.), cert. denied, 404 U.S. 984 (1971) cited at App. VI-29.

<sup>19</sup> It appears that the Ninth Circuit has concluded, in the absence of evidence that minorities are underutilized in the at-issue jobs, that the employers *should* have hired carpenters, machinists, bookkeepers, etc., through Local 37 or done what the trial court held was *unreasonable*, that is, recruit for skilled personnel in the thousands of square miles of tundra in Western Alaska in the dead of winter.

petitioners to establish why they did not utilize the cannery worker crews as sources for at-issue jobs (i.e., promote from within), hire machinists through Local 37, or recruit for skilled jobs in remote regions of Alaska, the Ninth Circuit is doing nothing less than substituting its judgment for that of the employer as to the best way to operate its business. This is a flat violation of the admonitions of this court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978) and reiterated in *Burdine, supra*, 450 U.S. at 259.

Where the employer has not underutilized minorities in the at-issue jobs, it is inappropriate to adopt a voluntary affirmative action plan to boost the number of minorities in those jobs. *Johnson v. Transportation Agency*, 480 U.S.\_\_\_\_, 94 L. Ed. 2d 615 (1987). Yet, in that very situation here, the Ninth Circuit is demanding that petitioners prove why they have *not* taken the different and "affirmative" steps of utilizing different sources for employees. The underlying assumption is that these steps would "maximize the number of minority workers" hired. Again, this violates the principle of *Furnco* and *Burdine*.<sup>20</sup>

### III. Allowing Plaintiffs to Challenge an Entire Range of "Named" Employment Practices Merely Because the Employers' Work Force Reflects Uneven Racial Balance Is an Improper Application of the Disparate Impact Model, Places an Unfair Burden on the Employer, and Exacerbates an Existing Conflict of Authority in the Circuits.

The only showing plaintiffs made in support of their impact theory attack on petitioners' hiring practice was the

<sup>20</sup> It is worth noting that if petitioners here would be prohibited under *Johnson v. Transportation Agency* from adopting an affirmative action plan for minorities in the at-issue jobs, it can hardly be said that minorities have established a *prima facie* case of disparate impact against them. See *Johnson v. Transportation Agency, supra*, 94 L. Ed. 615, 631 and n.10.

allegation that the cumulative effect of the practices identified was the concentration of minorities in the cannery worker jobs. This was shown by their comparative statistics. With but two exceptions,<sup>21</sup> they offered no other statistical evidence that even purported to show the impact of any one of the *sixteen* hiring practices they named, independent of the others. This is exactly what the plaintiff did in *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982); but unlike the Ninth Circuit here, the Fifth Circuit refused to allow plaintiff to misuse the impact theory in this way. 668 F.2d at 800-802.<sup>22</sup> The First Circuit agrees with the Fifth Circuit on this issue. *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014, 1016 (1st Cir. 1984). The Ninth Circuit has now joined the Eleventh Circuit, *Griffin v. Carlin*, 755 F.2d 1516, 1522-1525 (11th Cir. 1985), in conflict with the Fifth and First Circuits. This Court should resolve the conflict.

It is an important conflict to resolve. First, it is and will be a recurring problem. Many businesses have, for completely legitimate reasons, a concentration of a protected group in a particular job category. See, e.g., *Ste. Marie, supra*, 650 F.2d at 401-402; *Hilton v. Wyman-Gordon, supra*, 624 F.2d at 380; *Rivera, supra*, 665 F.2d at 539-542. Employers need to know whether the imbalance will force them, like petitioners here, to prove the business necessity of every practice a plaintiff chooses simply because plaintiff alleges they "combined" to "cause" that imbalance or concentration.

<sup>21</sup> Housing space charts and tables of relatives. The latter, along with plaintiffs' labor market statistics, were rejected.

<sup>22</sup> The Ninth Circuit unpersuasively tried to distinguish the facts in *Atonio* from *Pouncy* by saying that plaintiffs in *Atonio* "identified" (i.e., named) the practices. 810 F.2d at 1486, n.6. The plaintiff in *Pouncy* did the same thing. See 668 F.2d at 801 (names three practices).



An obvious solution for an employer is to eliminate the imbalance as economically as possible. To the extent an *overrepresentation* of minorities produced the imbalance (e.g., *Hilton, supra*, 624 F.2d 379), many employers will simply *reduce* the number of minority workers until *overrepresentation* disappears. If the petitioners here had adopted this "solution," e.g., by refusing to cooperate with Local 37 unless it dispatched only 10% nonwhites, plaintiffs would not have a case.

For the employer who cannot (or will not) reduce its minority work force in lower-paying jobs, one solution is to use an in-house defacto racial quota in the upper jobs until the percentage of minorities in the two categories is the same. This is directly contrary to the spirit and intent of Title VII. See 42 U.S.C. § 2000e-2(j) (Title VII does not require preferences or quotas because there is a racial imbalance). It also risks liability in reverse discrimination suits — particularly where there was no underutilization in the upper jobs. See *Hammon, supra*, 826 F.2d 73 (D.C. Cir. 1987) (voluntary affirmative action plan set aside because no underutilization shown).

Second, the impact model was designed to focus on a particular requirement, usually a selection criterion, that can be measurably shown to cause an adverse impact, e.g., *Pouncy, supra*, 668 F.2d at 801; see discussion, *infra*, IV. Most of the practices that plaintiffs here allege combined to cause the imbalance (e.g., requiring cannery workers to cut the grass; restrictions on fraternization; failure to post) are far from this conception and can be, at best, only tangentially connected to the reasons minorities are overrepresented in the cannery worker jobs. Indeed, plaintiffs did not offer proof designed to show the impact of any one, independent of the others.

This leads to a third and very important reason this conflict should be resolved in favor of petitioners: The more practices plaintiffs can "name" or "identify" as allegedly

causing the concentration, the more impossible becomes the employers' burden. For if the court finds that imbalance is sufficient to require the employer to prove business necessity, he could be forced to justify *every* practice identified. Courts may require "validation" under the EEOC Guidelines for Employee Selection Procedures — an enormously expensive proposition for *one* "procedure," but prohibitive for several.

The unfair risk and burden the employer faces is best illustrated by petitioners' situation: they have demonstrated to the satisfaction of district court and the Court of Appeals the business necessity of their rehire preference, an English language requirement, and (although the Ninth Circuit would disagree) of their hiring criteria. But they are *still* in court — because plaintiff named *other* practices that the Ninth Circuit says must *also* be justified, even though plaintiffs have not offered any evidence establishing that these *remaining* practices "caused" the imbalance, as opposed to the ones already proven to be a business necessity. This is exactly the situation the Fifth Circuit predicted in *Pouncy* would occur: allowing "disparate impact of one element to require validation of other elements having no adverse effects." 668 F.2d at 801.

#### IV. There is a Substantial Conflict in the Circuits as to Whether the Disparate Impact Analysis May Be Applied to Subjective Decision Making and Other Practices That Do Not Act as "Automatic Disqualifiers."<sup>23</sup>

The Ninth Circuit has now erroneously followed the Sixth, Tenth, Eleventh, and the District of Columbia Circuits in applying the impact analysis to subjective practices and criteria. *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982); *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985); *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*,

<sup>23</sup> See *Dothard v. Rawlinson, supra*, 433 U.S. at 338 (Rehnquist, J., concurring).

738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). The Fourth, Fifth, Seventh, and Eighth Circuits do not apply the impact analysis to subjective practices, although there are some conflicts within some of those circuits. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982); *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986); *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984); *Pegues v. Mississippi State Employment Serv.*, 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Pouncy v. Prudential Ins.*, 668 F.2d 795 (5th Cir. 1982); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981).

This Court has presently granted certiorari and heard argument (January 21, 1988) in *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1986), to review this important question. No. 86-6139.

This case illustrates a broader application of the issue than *Watson*, inasmuch as it poses several applications of the analysis, *e.g.*, word-of-mouth recruitment, "separate hiring channels," labeling, and the effect of challenges to the cumulative effect of multiple practices.

The decision in *Watson* may reach some of the issues raised by petitioners. While this Court may wish to consider ruling on this petition after that decision is issued, this case presents other important issues and the granting of the writ should not be delayed.

### CONCLUSION

Although they mounted a broad scale attack, plaintiffs were unable to prove any instance of individual or of class-wide disparate treatment of minorities in any aspect of the

employment relationship. Plaintiffs' fallback position was to allege under the disparate impact theory that petitioners' practices combined to cause unintentional discrimination. Without significant evidence of unfair treatment, plaintiffs were left to prove their impact case with comparative statistics. These statistics did nothing more than show "imbalance" — that there was an overabundance of minority workers in the cannery worker jobs. They proved nothing as to the *jobs at issue*. Plaintiffs' statistics were a simplistic reflection of the fact that Local 37 dispatched an oversupply of minority workers. In other words, but for the fact these petitioners fulfilled their collective bargaining responsibilities with Local 37, plaintiffs would not have an impact case.

The trial court saw through plaintiffs' theory; the Ninth Circuit did not. To justify its decision, however, the Ninth Circuit issued an opinion that has ominous implications not only for petitioners, but for litigation of all discrimination cases and for the conduct of everyday business.

This case presents a meaningful opportunity for this Court not only to correct an erroneous decision, but to finally establish the proper boundaries of the impact analysis, to clarify the role of statistics and the proper allocation of the burdens of proof in applying that analysis, and to resolve numerous and longstanding circuit conflicts in this important area of law.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ,  
WELLS & FRYER

*Attorneys for Petitioners*

\* Counsel of Record

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO,	)	
et al.,	)	
	)	
Plaintiffs,	)	NO. C-74-145-JLQ
	)	
vs.	)	
	)	OPINION FOLLOWING
WARDS COVE PACKING	)	NONJURY TRIAL
COMPANY, INC.,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

---

This class action challenges various employment practices of three Alaska salmon canning companies under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. V), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970 ed.). Early during the pendency of this lengthy action, the Title VII claims against two



of the defendant companies, Ward Cove Packing Company and Columbia Wards Fisheries were dismissed. Since then, the Ninth Circuit, in an amended decision, reinstated the Title VII claims against Ward Cove Packing Company. Atonio, et al. v. Ward Cove Packing Co., et al., Slip Op. No. 81-3181 (Oct. 21, 1982) (unpublished Order Amending Atonio, et al. v. Ward Cove Packing Co., et al., 703 F.2d 329 (9th Cir. 1982)). Plaintiffs are present and former employees alleging defendants discriminate on the basis of race in hiring, firing, paying, promoting, housing and messing at the canneries.

The class certified is all nonwhites who are, will be, or have been since March 20, 1974, employed by defendants Ward Cove Packing Company (WCP), Bumble Bee Seafoods division of Castle & Cooke, Inc. (BBS), or by Columbia Wards

Fisheries (CWF) at its Alitak or Ekuk cannery facilities. See Amended Certification Order of Chief Judge Walter T. McGovern at Ct. Rec. 138.

After a lengthy nonjury trial this court makes these

#### FINDINGS OF FACT

1. Plaintiff Frank Atonio is of Samoan descent. Plaintiffs Alan Lew and Curtis Lew are of Chinese descent. Plaintiffs Eugene Baclig, Joaquin Arruiza and Randy del Fierro are of Filipino descent. Plaintiff Gene Allen Viernes was of Filipino descent. He died on June 1, 1981. Barbara Viernes, his personal representative, was substituted as a plaintiff for him. Plaintiffs Clarke Kido and Lester Kuramoto are of Japanese descent. Robert Morris is of Japanese and Native American descent. All plaintiffs except Frank Atonio are United States citizens.

2. Defendant WCP is an Alaska corporation. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

3. Defendant Castle & Cooke, Inc. (BBS) is a Hawaii corporation, of which Bumble Bee Seafoods is a division. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

4. Defendant CWF is a joint venture. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

5. The joint venturers or operators of defendant CWF are defendants WCP and BBS. At least since 1970, WCP and BBS have operated the venture jointly and equally.

6. In operating the CWF joint venture, WCP and BBS have each acted as the agent of CWF.

7. At least since 1970, WCP has owned and operated two (2) Alaska salmon canneries: Red Salmon Cannery and Wards Cove Cannery.

8. At least since 1970, BBS has owned and operated one Alaska Salmon Cannery: Bumble Bee Cannery.

9. AT least since 1970, WCP and BBS have operated five (5) Alaska salmon canneries as part of the CWF joint venture: Alitak cannery and Ekuk cannery; Kenai cannery; Port Baily cannery; and Icy Cape cannery. They have also jointly and equally operated four



(4) Alaska fish camps as part of the venture: Egegik, Craig, Chignik Lagoon and Moser Bay, Alaska. The canneries having practices at issue in this case are Bumble Bee (at South Nahnek on Bristol Bay), Red Salmon (at Nahnek on Bristol Bay), Wards Cove (at Ketchikan in southeast Alaska), Ekuk (on the Nashugak River in Bristol Bay), and Alitak (on Kodiak Island).

10. The CWF facilities are owned by CWC Fisheries, Inc. It is a dormant corporation. Its only function is ownership of those facilities. Defendant WCP and BBS each own 50% of CWC Fisheries, Inc. The managers of CWF are the president and vice president of CWC Fisheries, Inc. The remaining officers and the directors of CWC Fisheries, Inc., are officers of WCP and BBS.

11. At least since 1970, WCP and BBS have each owned 50% of Lake Union

Terminals, Inc. Lake Union Terminals, Inc., owns a boat yard in Seattle, Washington which is known as LUT Yard. LUT Yard is a division of defendant CWF, which services assets such as tenders and fishing boats owned by CWC Fisheries, Inc., and WCP. CWC Fisheries, Inc., owns the defendant CWF tenders.

12. Plaintiff Arruiza was employed by defendant BBS during the 1971-73 salmon canning seasons.

13. Plaintiffs Kido and Karamoto were employed by defendant BBS during the 1971 salmon canning season. They were also employed by defendant WCP during the 1970 and 1972-73 salmon canning seasons.

14. Plaintiff Viernes was employed by WCP during the 1969-73 salmon canning seasons.

15. Plaintiffs Alan Lew and Curtis Lew were employed by WCP during the 1972-73 salmon canning seasons.

16. Plaintiff Frank Atonio was employed by WCP during the 1972-75 salmon canning seasons. He was also employed by defendant CWF during the 1980 season.

17. Plaintiff Randy del Fierro was employed by WCP during the 1970 and 1972-73 salmon canning seasons. He was also employed by defendant CWF during the 1971 season.

18. Plaintiff Robert Morris was employed by WCP during the 1973 season.

19. Plaintiff Eugene Baclig was employed by WCP during the 1969-73 seasons.

20. No representative plaintiff has worked at the CWF cannery at Ekuk.

21. On October 31, 1973 plaintiffs Frank Atonio, Lester Kuramoto, Clarke Kido and Eugene Baclig filed with the Equal Employment Opportunity Commission ("EEOC") the charges marked Exhibits 1-4. On November 16, 1973 plaintiffs Randy del

Fierro and Joaquin Arruiza filed with the EEOC the charges marked Exhibits 5-6. On January 2, 1974 plaintiffs Alan Lew and Curtis Lew filed with the EEOC the charges marked Exhibits 7-8. On January 31, 1974 Robert Morris filed with the EEOC the charge marked Exhibit 9. On February 14, 1974 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 10.

22. On November 13, 1973 the EEOC deferred the Atonio, Kuramoto, Kido, Arruiza and del Fierro charges to the Washington State Human Rights Commission. On January 23, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notices of the charges.

23. On January 9, 1974 the EEOC deferred the Lew charges to the Washington State Human Rights Commission. On January 18, 1974 the EEOC assumed

jurisdiction over these charges. The EEOC served the statutory notice of the charges.

24. On February 1, 1974, the EEOC deferred the Morris charge to the Washington State Human Rights Commission. On March 7, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

25. On March 4, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 6, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

26. On March 13, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 13, 1975 the EEOC assumed jurisdiction over the charge. The EEOC

served the statutory notice of the charge.

27. On March 11-12, 1974, the EEOC mailed plaintiffs Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Frank Atonio, Joaquin Arruiza and Randy del Fierro--as well as Robert Morris--the letter and right-to-sue notices marked Exhibits 11-18, 20-27. This action was filed within 90 days of receipt of those notices.

28. On May 24, 1974 the EEOC mailed plaintiff Baclig the letter and right-to-sue notice marked Exhibits 19 and 28.

29. On July 18, 1974 the EEOC mailed plaintiffs Alan Lew and Lester Kuramoto filed with the EEOC the originals of Exhibits 29-30. On August 5, 1974 plaintiff Eugene Baclig filed with the EEOC the original of Exhibit 31. On August 5, 1974 plaintiff Curtis Lew and Robert Morris filed with



the EEOC the originals of Exhibits 32-33. On August 21, 1974 plaintiff Clarke Kido filed with the EEOC the original of Exhibit 34. On September 24, 1974 plaintiffs Frank Atonio and Gene Allen Viernes filed with the EEOC the originals of Exhibits 35 and 37. In mid-October, 1974 plaintiff Randy del Fierro filed with the EEOC the original of Exhibit 527.

30. On November 13, 1974, the EEOC mailed plaintiffs Alan Lew, Curtis Lew, Eugene Baclig, Clarke Kido, Gene Allen Viernes, Frank Atonio and Lester Kuramoto--as well as Gene Allen Viernes and Robert Morris--the originals of Exhibits 38-53.

31. On June 27, 1972, Commissioner's charges were filed with the EEOC against WCP. They are marked Exhibits 54-55.

32. In February 1974 the EEOC entered into a conciliation agreement with defendants WCP and CWF based on the Commissioner's charge.

33. No plaintiff or member of the aggrieved classes described in the Commissioner's charges marked Exhibits 54-55 was a party to the conciliation agreement settling those charges.

34. The EEOC has not filed a civil action against either defendant WCP or defendant CWF on the basis of the Commissioner's charges.

35. On March 27, 1975 plaintiffs requested that the EEOC issue right-to-sue letters based on the Commissioner's charge against defendant Wards Cove Packing Company, Inc.

36. On April 15, 1975 the EEOC's Seattle District Office wrote plaintiffs' attorneys, declining to issue these right-to-sue letters.

37. On March 1, 1976 the EEOC's General Counsel overruled the Seattle District Office's decision not to issue right-to-sue letters based on a Commissioner's charge.

38. On March 19, 1976 the EEOC issued Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris and Gene Allen Viernes a letter and right-to-sue notices based on the Commissioner's charges against Wards Cove Packing Company and Columbia Wards Fisheries. They are marked Exhibits 56-57.

39. On April 22, 1976 plaintiffs moved for an Order indicating that the court would permit them to amend their complaint so as to allege receipt of the right-to-sue notices.

40. On July 21, 1975 plaintiff Clarke Kido filed the EEOC charge marked Exhibit 58.

41. On July 25, 1975 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 7, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

42. On March 11, 1980 the EEOC mailed plaintiff Clarke Kido the right-to-sue notice marked Exhibit 428.

43. On May 1, 1980 plaintiffs moved to amend their complaint so as to allege receipt of the letter and right-to-sue notice.

44. On June 20, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 528, and filed with the Washington State Human Rights Commission the charge marked Exhibit 429.

45. On or prior to September 1, 1977 the EEOC assumed jurisdiction over

the charge filed with it. The EEOC served the statutory notice of the charge.

46. On August 3, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charged marked Exhibit 430.

47. On August 5, 1977 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 26, 1977 the EEOC assumed jurisdiction over the charge. The EEOC served statutory notice of the charge.

48. On May 31, 1978 the EEOC mailed plaintiff Viernes the right-to-sue notices marked Exhibits 431-32.

49. The defendants are engaged in the salmon processing business in various Alaska locations. Most of the processing has been done by canning although in recent years some has also been done by freezing.

50. Defendants' facilities are generally located in remote, widely

separated areas of Alaska. Thus, the canneries and fish camps are self-supporting installations where the crews are housed and fed by the company.

51. Since summer salmon runs are very short, it is essential that the canneries operate at peak production as much of the time as possible.

52. Most of the jobs at the canneries are seasonal and of short duration. Only the cannery superintendent, the assistant cannery superintendent, and certain office personnel are employed by the company on a permanent year-around basis with the exception of Ward Cove's small winter maintenance crew and certain machinists, carpenters, beachmen and tendermen who may be employed in the shipyard in the offseason. Each facility also has a winter watchman.



53. In some years, a cannery may not operate at all. Some facilities are abandoned canneries which operate as fish camps. A fish camp is a support facility for fishermen which does not process salmon by canning or freezing.

54. Wards Cove cannery canned salmon in 1970 and 1972-80, and operated as a fish camp in 1971. Red Salmon Cannery canned salmon in 1970-72 and 1977-80, and operated as a fish camp in 1973-76. Bumble Bee cannery canned salmon in 1970-73 and 1975-80, and operated as a fish camp in 1974. Ekuk cannery canned salmon in 1970-80. Alitak canned salmon in 1970-80.

55. Readyng the canneries and fish camps for operations is done during May or June of each year.

56. Preseason work is intense, involving extensive overtime, and must be done in a short period of time.

57. The intense period of preseason work allows no time for training unskilled workers for skilled jobs.

58. When the cannery is open and running, the cannery workers arrive just before the start of fishing operations. If they are idle prior to canning, they are often given unskilled work as called for by their contract, such as grass cutting and cannery cleanup. The grass is cut by knives and hand sickles. Use of lawn mowers is impractical due to the length of the grass and steep hilliness of much of the terrain.

59. In addition to estimates made by the Alaksa Department of Fish and Game and the Fisheries Research Institute at the University of Washington, management makes its own estimate for each run at each facility. Accordingly, the decision is made as to how many canning lines to

operate and the number of employees to be hired.

60. Frequently, the predicted run varies considerably from the actual run, and during the season the actual catch may vary tremendously on a daily basis. Also, the Alaska Department of Fish and Game will open or close fishing by emergency order depending upon the amount of escapement.

61. All fishermen are now "independent", on their own boats and are not employees. They are paid by the pound for fish and each crew divides the profit on a share basis. Prior to 1974, "company" fishermen were paid by the fish or, on a piecework basis.

62. Bristol Bay gillnet fishing boats and some seine boats on Kodiak Island are stored in the offseason in the cannery. Due to the remoteness of those locations, repairs to those fleets are

performed by such cannery employees as the caulkers, shipwrights, carpenters, and port engineers.

63. Salmon are extremely perishable and must be processed within 48 hours of capture. Most salmon is transferred from the fishing grounds to the canneries aboard "dry" or unrefrigerated tenders; refrigerated or "brine" tenders can hold fish for several days and can transfer them to other areas for processing.

64. Tenders carry equipment and supplies to the cannery location in time for use and storage well in advance of operations. During the season, the tenders will also count fish by species. In Bristol Bay, fishermen were often fed on the tenders during unloading until 1981.

65. After arrival at the cannery, the fish are conveyed to a "fish house" where the salmon are eviscerated, the

eggs pulled, and they are cleaned. In the fish house is located the salmon butchering machine. This eviscerating machine is patented under the name of "Iron Chink" machine.

66. Salmon eggs are processed under the supervision of Japanese nationals who are not employees of the defendants. The processed eggs are marketed in Japan as a specialty product known as "suyiko".

67. The canning is done under regulation of the Food and Drug Administration. The major cleanup, which is performed every 24 hours and which lasts approximately 3-1/2 to 4 hours, is mandatory. The canning lines run at a rate of 235-260 cans per minute or four cans per second.

68. After filling, the canned salmon are cooked in steam pressure retorts. The precise time/temperature requirements are established by the FDA.

Failure to keep accurate records can result in FDA seizure and impoundment of all lots for which there are no records verifying that a "proper cook" was made. The cannery could be forced to recan and recook all "suspect" lots, an expensive procedure.

69. It is important that the machinists ensure that proper seals on can bottom (can shop machinist) and top (seamer machinist) are made, the side seams are secure, and that the salmon are properly cooked (salmon cook) to avoid botulism and to provide a wholesome, quality product for sale.

70. During the canning operation, various machinists are engaged in ensuring the continued smooth operation of the equipment. There are several who specialize in certain equipment; that is, the "filler man", "seamer man", "salmon cook", and "can shop" are typical of these



specialties. In case of a breakdown of the machine, an entire line will be out of production until repair is effected.

71. CWF also maintains and operates a shipyard in Seattle, Washington, under the name "Lake Union's Terminals". BBS also has a resident vice president with a small support staff at 88 East Hamlin in Seattle. The home office of its Bumble Bee Seafoods division is Astoria, Oregon where the Bumble Bee cannery superintendent and his staff is located.

72. At least since 1970 John R. Gilbert has been defendant BBS's vice president in charge of Alaska operations and one of two managers of the CWF's joint venture.

73. From at least 1970 through 1977, A.W. Brindle was president of defendant WCP and a manager of the defendant CWF joint venture. After his

death in 1977, A.W. Brindle was succeeded in these roles by Alec W. Brindle.

74. The overall management of CWF is vested in Alec W. Brindle and John R. Gilbert. They communicate directly with each operations' superintendent.

75. Exhibit 60 is the only document generally governing the terms of the defendant CWF joint venture. It was executed by defendant WCP and the predecessor of defendant BBS in the venture.

76. Employees at 88 East Hamlin, Seattle, Washington perform duties for both defendants WCP and defendant CWF regardless of which defendant's payroll they are on.

77. At least since 1970 defendant CWF has not had an independent representative at collective bargaining negotiations. Instead, it has relied on

the representative of defendants WCP and BBS.

78. At least since 1970 the president of defendant WCP has been primarily responsible for setting its hiring policies, firing policies, promotion policies and employee regulations. He has also been responsible for hiring its cannery superintendents and office managers. The vice president in charge of Alaska operations for defendant Castle & Cooke, Inc., has had similar responsibilities for that defendant's cannery. These two individuals have jointly and equally had the same responsibilities for the defendant Columbia Wards Fisheries' facilities.

79. Decisions on whether a plant will operate, the size of its crew, salaries of its non-union personnel, the basic amounts of its supplies, the

equipment it will have, whether a capital expenditure should be made and other major decisions are made jointly for CWF by the venture's managers. Such decisions are made for defendant WCP's facilities by its president. Those decisions are made for the BBS facility by its vice president in charge of Alaska operations.

80. Except as described elsewhere, the superintendent of each facility is ultimately responsible for recruiting, screening, hiring, promoting and terminating employees for that facility. He is also ultimately responsible for assigning employees to bunkhouses, assigning crews to dining areas and making improvements which do not require capital expenditures.

81. At least since 1970 the superintendent of defendant BBS's facility has reported directly to that

defendant's vice president in charge of Alaska operations. During 1970-77 the president of WCP was also superintendent of Red Salmon Cannery. The superintendent of Wards Cove Cannery reported directly to him. Since 1977 superintendents of both canneries have reported directly to Alec W. Brindle, who is the current president of defendant WCP.

#### HIRING POLICIES AND PRACTICES

82. Preliminarily, it must be noted there are two (2) general categories of cannery jobs. The first category includes the "cannery" workers and "laborer" jobs. The second category includes all other departments and are designated "noncannery" jobs. It is the "noncannery" jobs which are at issue in this lawsuit.

83. None of the five class canneries has advertised for jobs at

least since 1970, although the Alaska State Employment Service has been called. Generally, vacancy notices have not been posted at the Bumble Bee, Red Salmon, Ward Cove or Ekuik canneries since 1970 and at least from 1970 through 1975 mid-season vacancies have not been posted at Alitak except for two positions for cook and one for "laundress-bedmaker".

84. Many of the jobs at defendants' facilities are covered by union contracts which have rehire preference clauses.

85. Defendants' policy and practice is to adhere to the union rehire preference clauses and to offer employment in the same jobs to past satisfactory employees for the new season. Employees, including nonresident cannery workers, take advantage of these clauses to secure employment. Nonresident cannery workers are those whose off-season residence is the



Lower 48. Resident cannery workers are those whose off-season residence is Alaska.

86. Hiring for all jobs except resident cannery workers and spring and fall laborers takes place at defendants' home offices in Seattle and Astoria during the first three months of the year. Most employees, particularly in the skilled jobs, are hired before April 1 each year for the upcoming season. Most non-cannery jobs also require availability by the end of April for that year.

87. The rehire preference rights of past employees are respected in determining the number of vacancies to be filled for the new season. The remaining vacancies are filled from among those who seek employment with defendants during the fall and winter preceding the upcoming season. Defendants do not

generally look to applications for the preceding season in filling openings for the upcoming season.

88. Defendants generally do not treat general oral inquiries about jobs made during the preceding season as an application for a position in the upcoming season a year away. This is particularly true when the employee fails to follow up the inquiry with an application. Defendants do not treat white or nonwhite persons differently in this respect.

89. Defendants receive far more applications than there are vacancies for the upcoming season. The majority of the applications for non-cannery worker positions are by whites or by persons who are not identifiable as racial minorities. Defendants have received relatively few applications from nonwhite

employees for noncannery worker positions.

90. Resident cannery workers and spring and fall laborers are usually hired from the general labor force in the areas closest to each cannery. Except for Wards Cove, this labor force is small. The 1970 Census for the City of South Naknek, Exhibit A-35, illustrates this. The entire population of Bristol Bay Census Division, which covers thousands of square miles, was only 3,500 people in 1970. It is not a reasonable business practice to scour such sparsely populated, remote regions for skilled and experienced workers.

91. Except at Ekuk, non-resident cannery worker jobs which are not filled by employees with rehire preferences are filled through the dispatch procedure of Local 37.

92. Local 37 male members have refused to work in the egg department without overtime and by special agreement with the union workers outside the Local 37 source are hired although they must join the union.

93. Management does not direct any of its cannery worker foremen to hire or line up members of any particular race for his crew.

94. Employees and non-employees are free to apply for any job for which they feel qualified. Similarly situated applicants are treated equally.

#### PROMOTIONS

95. Most people hired at defendants' facilities are persons entitled to a rehire preference or are hired from the external labor market rather than through promotions or transfers from another position or department within the cannery.

96. There are very few midseason vacancies in jobs. There is not time during the season to fill such vacancies through a posting, application, interview and training procedure.

97. Most higher paying positions within a department are not filled from the lower paying positions within the same department at a cannery.

98. Midseason promotions or transfers across union and/or departmental lines are rare.

99. Promotions or transfers across departmental lines from one season to the next are rare.

100. Many of the spring and fall laborers hired by defendants are not available for employment during the summer season because they choose to fish instead.

## REASONABLE BUSINESS PRACTICES

### AND BUSINESS NECESSITY

101. The job preference clause operates like a seniority system.

102. Because of the intensity of the salmon run, the high cost of error, and demands placed upon the cannery, experienced applicants are given priority over inexperienced applicants even though both possess the same general skills.

103. Local 37 provides an oversupply of nonwhite cannery workers for all defendants' canneries except Ekuk.

### LABOR MARKET

104. The employees in the various job classifications are not fungible. Each job or job department requires differing qualifications, primarily skill and/or experience. Preseason availability is often an important qualification. Defendants must look to the labor market providing individuals



with the skills and experience required by each job. Many noncannery workers' jobs require skills and qualifications not possessed by nor readily acquirable within a reasonable time by unskilled, inexperienced persons at the canneries.

105. The racial composition of cannery workers and laborers at defendants' facilities is predominantly nonwhite. This is so because Local 37 is the primary source of non-resident cannery workers for all but one of defendants' facilities, and the membership and leadership of Local 37 is predominantly Filipino.

106. Filipinos constitute about one percent (1%) of the population and approximately one percent (1%) of the labor force (over age eighteen) in the geographical region from which defendants draw their employees, that is, Alaska, the Pacific Northwest, and California.

107. The available labor supply in this relevant geographical area for cannery worker, laborer, and other nonskilled jobs is approximately ninety percent (90%) white. Nonwhites, particularly Filipinos and Alaska Natives, are thus greatly overrepresented in these jobs at the defendants' canneries.

108. Local 37, ILWU, has not asserted jurisdiction rights over non-resident cannery workers at Ekuk. Starting in 1971, Ekuk hired non-resident cannery workers without utilizing a Local 37 cannery worker foreman or the union in any way. The percentage of Filipino nonresident cannery workers hired by Ekuk is significantly less than the percentage of Filipinos hired as nonresident cannery workers at Red Salmon, Bumble Bee, Wards Cove, and Alitak - all four of which have a contract

with Local 37 to supply nonresident cannery workers.

109. Alaska Natives constitute only a small portion of the overall general population in the section of Alaska where canneries are located. However, in those remote, sparsely populated areas which are immediately adjacent to the canneries at Naknek, South Naknek, Alitak, and Ekuk, the native population is a significantly greater percentage than it is compared to the general Alaskan population which includes the predominately white city populations. Consequently, Alaska Natives comprise a high percentage of the local labor market for resident cannery workers and laborers at the canneries located at Naknek, South Naknek, Alitak, and Ekuk. For the same reason, that is, because of its Ketchikan location, the percentage of Alaska Natives hired at Wards Cove is significantly less than the

percentage of Alaska Natives hired as resident cannery workers at the other four facilities. This is so because the area immediately adjacent the Ward Cove Cannery is not sparsely populated.

110. Persons filling cannery worker and laborer jobs are not part of the labor supply for jobs requiring differing qualifications at defendants' facilities. Defendants' cannery workers and laborers do not form a labor pool for other jobs at defendants' facilities.

111. A Local 37 cannery worker who is transferred during the season to a job under another union's jurisdiction can claim both his season guarantee as a cannery worker in addition to his earnings in the new position.

112. Company policy has been to hire workers from without rather than to transfer or promote from within.

113. Most cannery worker and laborer jobs do not provide training for other work in the cannery. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

114. The end of each canning season terminates the employment of cannery workers.

115. The older Filipinos tend to dominate the other cannery workers in requests covering matters such as housing and messing.

116. There has been a general lack of interest by cannery workers in applying for noncannery workers jobs.

117. Most cannery worker jobs do not require that the employees be able to communicate effectively, or be literate, in the English language and none of them require early season availability. Most

other jobs at the canneries require both of these qualifications.

118. Most students are not available for preseason work required in most noncannery worker jobs.

119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

120. Thus, while census data is dominated by people who prefer full-year, fixed-location employment, such data is nevertheless appropriate in defining labor supplies for migrant, seasonal work.



121. Based on a sample of almost one-half of the industry, 48% of the individuals employed in the Alaska salmon canning industry during 1970-78 were nonwhite. This is so primarily because nearly all employed in the "cannery worker" department are non-white. The institutional factor of Local 37's overrepresentation of non-whites accounts for this statistic. Accordingly, the court does not assign considerable weight to this statistic.

122. The percentage of nonwhites employed in the Alaska salmon canning industry during 1906-39 and 1941-55 has historically been from about 47% to 70%. Toward the end of this period it has stabilized at about 47% to 50%.

123. Eighty-eight percent (88%) of the class members are Alaska Natives or of Filipino descent. Defendants' labor market data proved that the percentage of

whites hired in the following jobs in the aggregate by facility or by combination of facilities is either less than the percent of whites in the labor supply or does not exceed the percentage of whites in the relevant labor supply by a statistically significant amount. In only a few instances does the percentage of whites hired in these jobs aggregated by department exceed the percentage of whites available in the relevant labor supply; in some instances, nonwhites are over represented in the jobs taken on a department-by department basis.

Administration: All jobs.

Beachgang: crane operator, gas man, net boss, net man, oil dock, outside foreman, pile buck foreman, setnet pickup, truck driver.

Carpenter: All jobs.

Culinary: baker, cook, cook/baker, steward/baker, steward/cook, steward.

Machinists: diesel operator, electrician, first machinist,

machinist foreman, mechanic,  
port engineer, refrigeration  
machinist, shop machinist,  
welder, machinist helper/  
electrician, refrigeration  
machinist/can shop machinist,  
salmon cook/shop machinist,  
shop machinist/can shop  
machinist, shop machinist/pipe  
fitter, shop machinist/port  
engineer, shop machinist/  
fireman.

Tender: captain.

Miscellaneous: all jobs except  
quality control, janitor, and  
laundry/cannery worker.

All Year-Round Jobs:

Store/Stockroom: Naknek  
Trading Company.

Office: Administrative assist-  
ant.

Beachgang: beach boss,  
beachman, pile buck,  
beachman/truck driver.

Culinary: kitchen help,  
laundry, waiter/waitress.

Machinists: cold storage  
machinist, can shop machinist,  
casing machinist, filler  
machinist, fireman, iron chink  
machinist, machinist, machinist  
helper, machinist helper/oil  
cook, pipefitter/fireman,  
pipefitter, salmon cook/  
pipefitter, salmon cook, seamer  
machinist, brite stack

machinist/pipe fitter, iron  
chink machinist/casing  
machinist, pipe fitter/oil  
cook.

Fisherman: company fisherman  
(captain and partner).

Miscellaneous: quality  
control, janitor, laundry/  
cannery worker.

Office: (except for a few  
instances where they were  
seasonal, these jobs are year  
round), accountant, assistant  
bookkeeper, bookkeeper, office  
help, office manager,  
secretary.

Store/stockroom: stockroom  
help, stockman, storehelp,  
storekeeper, Naknek Trading Co.  
manager.

Tenders: deckhand, mate,  
mate/deckhand, talleyman,  
tender engineer, tenderman,  
tendercook/deckhand.

JOB QUALIFICATIONS

124. At the canneries, defendants do  
not provide on-the-job training of  
unskilled, inexperienced persons for jobs  
requiring skill and experience.

125. Because of the lack of time and personnel available for training at a salmon cannery, skills or qualifications cannot be considered "readily acquirable" unless they can be acquired within a matter of days with a minimal amount of training time required of supervisory and other skilled personnel.

To maximize production and minimize the amount of training which must be done at the canneries, defendants attempt to hire experienced persons in all job categories.

126. Qualifications required for any individual position depend to a certain extent on the cannery involved, the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors. It is not practical or realistic, in terms of running a safe, efficient, and profitable operation to

staff each position with people meeting only the stated minimum requirements.

127. Many lower paying jobs (e.g., carpenter apprentice-helper, deckhand, machinist helper, kitchen help) within departments are not "entry level" positions for vacancies in higher paying positions within the same department at defendants' canneries.

128. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

129. Below is a composite list by department of all job titles which have been filled at any time, at any of defendants' facilities between 1970-80: (No individual cannery would fill this many job titles in any given season.)

Administration:

Assistant Manager



Assistant Superintendent  
Double Star Coordinator  
Manager  
Purchasing Agent  
President  
Roe Operations Manager  
Sales Manager  
Superintendent

Beachgang:

Beach Boss  
Beachman  
Beachman/Truck Driver  
Crane Operator  
Dock Manager  
Gas Man  
Net Boss  
Net Man  
Oil Dock (including  
Standard Oil dock crew)  
Outside Foreman  
Pilebuck  
Pilebuck Foreman  
Setnet Pickup

Truck Driver

Carpenter:

Carpenter  
Carpenter Apprentice  
Carpenter/Shipwright  
Carpenter Foreman  
Caulker  
Contract Carpenter  
Painter

Culinary:

Baker  
Cook  
Cook/Baker  
Kitchen Help (includes  
bull cook)  
Laundry  
Steward/Baker  
Steward/Cook  
Steward  
Waiter/Waitress

Cannery Worker:

Cannery Worker (includes  
crab and freezer  
processing workers)

Fisherman:

Company Fisherman (Bumble  
Bee, Red Salmon and Egegik  
only)

Machinist:

Brite Stack Machinist/  
Pipefitter

Cold Storage Machinist

Can Shop Machinist

Casing Machinist

Diesel Operator

Electrician

Filler Machinist

Fireman

First Machinist

Salmon Butchering  
Machinist

Salmon Butchering  
Machinist/Cashing

Machinist

Machinist Foreman

Mechanic

Machinist Helper/Trainee

Machinist  
Helper/Electrician

Machinist Helper-Oil Cook

Pipe Fitter/Fireman

Pipe Fitter/Oil Cook

Pipe Fitter

Plant Engineer

Port Engineer

Refrigeration Machinist

Refrigeration  
Machinist/Can Shop  
Machinist

Salmon Cook

Salmon Cook/Fireman

Salmon Cook/Pipe Fitter

Salmon Cook/Shop Machinist

Seamer Machinist

Shop Machinist

Shop Machinist/Can Shop  
Machinist

Shop Machinist/Pipe Fitter

Shop Machinist/Port  
Engineer

Shop Machinist/Fireman

Welder

Laborer:

General Laborer

Spring/Fall Workers

Office:

Accountant  
Administrative Assistant  
Assistant Accountant  
Assistant Bookkeeper  
Bookkeeper  
Office Help  
Office Manager  
Purchasing/Bookkeeper  
Sales Clerk  
Secretary

Store and Stockroom:

Naknet Trading Co. Manager  
Stockman  
Stockroom Help  
Storehelp  
Storekeeper

Tenders:

Captain  
Deckhand  
Mate

Mate/Deckhand

Tallyman

Tender Engineer

Tenderman

Tender            Cook/Deckhand  
(includes Tender Cook)

Miscellaneous:

Affirmative            Action  
Representative  
  
Beachman/Store Helper  
  
Consultant  
  
Double Star Captain  
  
Double Star Carpenter  
  
Double Star Cook  
  
Double Star Cannery Worker  
  
Double Star Deckhand  
  
Double Star Engineer  
  
Double Star Foreman  
  
Double Star Mate  
  
Foreman (Unspecified)  
  
Inventory Control  
  
Janitor  
  
Maintenance



Miscellaneous

Monkey Boat Operator

Nurse

Office Helper/Store Helper

Quality Control

Radio Operator

Recruiter

Roustabout

Store            Helper/Kitchen  
Helper

Traffic Manager

Night Watchman

Winter       Laborers       and  
Assistants       to       Winter  
Watchman

Winter Watchman

(Employees with no job  
title are included in this  
department)

L.U.T. Yard:

Yardworker

Yard Foreman

Certain persons who have  
appeared on cannery payrolls,  
but are either not employees  
(independent fishermen) or who  
worked on special construction  
projects and were hired by the

constructions project manager  
are not included in a  
department.

Virtually all of the jobs in the  
administration and office job departments  
are filled by year-round employees who  
work at company headquarters. As part of  
their regular job duties, most of them  
work at company headquarters in the  
offseason but at the defendants'  
facilities in Alaska during the salmon  
processing season. There are also many  
individuals, primarily in the machinist,  
carpenter, and tender departments, who  
are for all practical purposes year-round  
employees. They work at defendants'  
shipyards in the offseason and, as part of  
their regular job duties, work at  
defendants' Alaska facilities during the  
season.

130. The following jobs are  
supervisory, require management

abilities, and extensive experience to successfully perform:

- (a) superintendent (manager)
- (b) cannery (machinist)  
foreman
- (c) assistant superintendent  
(assistant manager)
- (d) first machinist
- (e) office manager
- (f) carpenter foreman
- (g) beach boss
- (h) net boss
- (i) setnet pickup boss
- (j) tender captain
- (k) steward
- (l) first cook (if no steward  
at facility)
- (m) outside foreman (Ekuk)
- (n) skipper of Double Star
- (o) Manager of Naknek Trading  
Co.
- (p) pilebuck foreman

131. The following jobs require substantial prior skill and experience to successfully perform:

- (a) port engineer
- (b) wet tender (briner)  
engineer
- (c) carpenter
- (d) carpenter/shipwright
- (e) caulker
- (f) shop machinist
- (g) refrigeration man
- (h) electrician
- (i) steward
- (j) baker
- (k) cook
- (l) radioman
- (m) doctor
- (n) nurse
- (o) accountant
- (p) company fisherman
- (q) welder
- (r) pipe fitter

- (s) pilebuck
- (t) netman
- (u) crane operator
- (v) cold storage machinist
- (w) Double Star engineer
- (x) Standard Oil  
distributorship manager
- (y) traffic manager
- (z) sales manager
- (aa) purchasing agent

132. Qualifications reasonably required for successful performance of the jobs listed below are as follows:

Salmon Butchering  
Machinist. Requires two seasons experience as a helper-trainee in the fish house with one winter of offseason training or one year of mechanical experience of a similar nature. This job also

requires an ability to work with minimum supervision and without the aid of shop manuals, a knowledge of and ability to use mechanic's hand tools for adjustments and repair of equipment, early season availability, and ability to understand and communicate effectively in English. Must be capable of training a machinist helper-trainee in the fish house if one is employed.

Reformer-Can Shop  
Machinist. Requires two seasons as machinist helper-trainer in cannery or six months mechanical experience of a similar nature. Job requires the



ability to work without close supervision, knowledge of and ability to use seam micrometers, gauges and mechanic's hand tools to comprehend, and communicate effectively in English, understand mechanical drawings, and possess leadership skills. Early season availability is also required.

Fillerman. Requires two seasons as machinist helper-trainer on the canning line with one winter of offseason training, or one year of mechanical experience of a similar nature. Knowledge of and ability to use mechanic's hand tools to

make adjustments and repairs to equipment is required. Ability to read, comprehend, and communicate effectively and availability are required. Leadership skills may also be required.

Filler Operator. See machinist helper-trainee.

Seamerman. Requires two seasons experience as a machinist helper-trainee in the cannery or six months mechanical experience of a similar nature. Ability to read, comprehend, and communicate effectively in English is required. Knowledge of and ability

to use mechanic's hand tools to make adjustments and repairs to equipment is required. Early season availability is also required.

Seamer Operator. See machinist helper-trainee.

Salmon Cook-Pipefitter. Requires one year of plumbing and/or pipefitting experience, less depending on amount and type of experience with boilers or pressure vessels. Job requires proficiency in basic mathematics, ability to read gauges and thermometers, and ability to handle the strain, responsibility, and

pressure of "cooking" as many as nine retort loads of salmon simultaneously. Must have knowledge of and ability to use mechanic's and pipefitter's tools to make adjustments and repairs. Must be able to understand and accurately complete required inspection and report forms required by governmental agencies and industry associations. Early season availability is also required.

Machinist Helper-Trainee. Requires mechanical ability, knowledge of and ability to use mechanic's tools. Must be flexible, willing to learn, and to

follow directions. Must be able to communicate effectively in English and have the ability to read and comprehend English if placed in canning line or can shop. Early season availability is required.

Fireman. Requires mechanical ability, ability to use mechanic's and some pipefitting tools, and early season availability. (In addition, for the above machinist crew jobs, possession of at least one of the following additional skills is highly desirable and preferred in hiring: welding, pipefitting,

electrician, and machine shop; requires willingness and ability to work independently or with other crew members in performing a wide variety of maintenance and repair tasks on cannery buildings, grounds, fixtures, and equipment).

Quality Control. Requires ability to read, comprehend, and communicate effectively in English, ability to check weights, record temperatures, and use basic mathematics through decimals. Must have ability to handle detail, be able to handle reports and paperwork, be



reliable, and be honest. One season of general cannery experience or other relevant experience or education, such as food technology, is required.

Beachman. Requires good health, and the capacity for and ability to perform heavy work out-of-doors. Requires familiarity with wide range of hand tools (both mechanical and carpentry), small power tools, and operation of forklifts and other equipment. Minimum qualification requirements vary depending on size of beachgang: the larger the beachgang, the greater the ability to take on less

skilled personnel. Minimum qualifications for a new beachman joining a crew of three or more beachmen (not including beach boss) would be three to six months prior heavy work experience, preferably out-of-doors and construction or shipyard related.

Dry Tender Engineer. Requires one year of related boat experience or six months engine mechanical experience and one season of tender experience, knowledge of and ability to use mechanic's and some pipefitting tools to make adjustments and repairs to

shipboard machinery and equipment, ability to live in small quarters and function as an effective member of a small group. Willingness and ability to work long hours on ocean-going vessel is required. Ability to act as relief helmsman and back-up navigator may be required on some boats.

Accountant. For portion of job performed in Alaska, see Bookkeeper.

Bookkeeper. Requires two years formal bookkeeping education or comparable work experience, familiarity with use of computers in data processing depends on

location, typing and ability to accurately operate ten-key calculator. Two seasons as assistant cannery bookkeeper would also satisfy requirements. English literacy and preseason availability are required.

Assistant Bookkeeper.

Requires knowledge of basic bookkeeping, basic mathematics, familiarity with use of computers in data processing depends on location. Job also requires ability to use typewriter and accurately operate ten-key calculator. English literacy is required.

Preseason availability  
required. |

Office Assistant/  
Bookkeeper-Helper.

Requires knowledge such as  
would be obtained from  
office practice training  
course or comparable work  
experience, knowledge of  
basic mathematics, ability  
to type, and ability to  
accurately use ten-key  
calculator. Preseason  
availability may be  
required. English  
literacy required.

For those of the above  
jobs which may be year-  
round, the stated  
qualifications do not  
necessarily deal with the

off-season requirements of  
their jobs.

133. The qualifications necessary to  
successfully perform the remaining jobs  
are as follows:

Deckhand: Aptitude for  
marine work, early season  
availability, willingness  
to work long, irregular  
hours on ocean-going  
vessel. Marine experience  
preferred. English  
language required.

Tender Cook/Deckhand:  
Cooking experience, amount  
and type depends on  
location, aptitude for  
marine work, willingness  
to work long irregular  
hours in cramped quarters  
on ocean-going vessel,  
early season availability,



English language required,  
marine cooking experience  
preferred.

Company Fishing Boat  
Partner: Determined by  
captain, but generally  
fishing experience and  
aptitude for marine work,  
willingness to work long  
hours on very cramped  
ocean-going vessel, and  
willingness to work on a  
"share" basis (that is,  
without any guaranteed  
wage, wage rate, or  
salary).

Carpenter Apprentice:  
Aptitude for carpentry  
work. Early season  
availability. Carpentry  
work experience preferred.  
English language required.

Truck Driver and Setnet  
Pickup. Driving  
experience, amount and  
type depends on truck  
involved. Driver's  
license. English language  
required.

Stockman. English  
literacy; record keeping  
ability; knowledge of  
hardware, machinery, and  
parts.

Storekeeper. Requires  
knowledge of and ability  
to perform record keeping  
and basic bookkeeping,  
maintain credit records,  
manage inventory records,  
ordering of supplies.  
Must be physically able  
and willing to stock  
shelves. Early season

availability required. At larger stores (Ekuk, Chignik, Bumble Bee) must have considerable retail experience. At smaller stores (Alitak, Port Bailey, Keni) must have some retail experience. English literacy.

Storekeeper At Wards Cove.

Must have driver's license, physical strength, and English literacy.

Winter Watchman and Caretaker. Must be

responsible individual willing to spend several months in winter weather at very isolated locations. Qualifications depend somewhat on

location, but generally person must have the skill and ability to diagnose, maintain, and effect repairs on various cannery equipment and buildings.

134. The parties agree that no prior special skills are necessary to perform the following miscellaneous jobs: gasman or oilman, apprentice carpenter, carpenter's helper, winter watchman, night watchman, AFU waiter, and AFU dishwasher. The court finds that all at-issue (noncannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman





05-431 thru 05-440 Beach Gang and Truck Drivers

06 Fish Boss

07 Net Boss

08-445 thru 08-474 Machinists

09-475 thru 09-524 Girls

09-525 thru 09-574 Filipinos

09-575 thru 09-659 Natives

09-660 thru 09-674 Miscellaneous

10-675 thru 10-699 Carpenters

11-700 thru 11-729 Commissary

12-730 thru 12-739 Labor

13-740 thru 13-750 Other Labor

Exh. 467.

138. Laundry for nonresident cannery workers at Wards Cove was stored in bags marked "Oriental Bunkhouse", and the mail slot where the nonresident cannery workers received their mail was similarly marked.

139. A letter from A. W. Brindle dated December 15, 1970 states:

There is one more thing I want to tell you that probably will happen. We built a new bunkhouse. We expected to move all the carpenters and all the machinists into it. Apparently this is not working out due to the beachmen coming in and out. I have considered now taking the room that Vern used to have and the two rooms that Ned had and making those rooms into a room for the beachmen and putting a shower in so they would be away from the fishermen. The (sic) come in and out at night and it would be quieter for them. I would then use the new bunkhouse for women. The reason for this is these Eskimos are completely impossible. We have nothing but trouble and we probably had less trouble than the majority. Nelbro for instance had 43 quit one morning. We had all of our refuse to go to work on July 2nd at 8 o'clock until I agreed to give them additional pay over and above the contract.

Exh. 452.

140. A memo from Winn F. Brindle dated December 29, 1972 states:

This letter from Frank B. Peterson is to give Salvador a bit of status in the community.

As you well know, the Filipinos both at home and

abroad are difficult to deal with.

Exh. 253.

141. A May 25, 1970 memo from Don Ballard to the Seattle office of WCP states in part:

Hardy, could you check with Mayflower press about those little square pre-printed cards for the buttons. We should have had them up here before now, we got 24 Eskimos in yesterday and I would like to get these things made up so I know who they are and also to keep the other bums out of the Mess Hall.

Exh. 454.

#### MESSING

142. As stated earlier, Filipino and Asians are overrepresented in Local 37.

143. The bargaining representative for nonresident cannery workers have traditionally asked for Oriental and Filipino food, and a separate menu for its members. Management has acceded to these wishes. The older persons in the Local 37 crews prefer this arrangement.

144. The Local 37 contract provides for a separate culinary crew for the Local 37 crew.

145. The quality and quantity of food served in mess halls is the responsibility of the cook in the mess hall. Most complaints about the food can be traced to matters of personal taste or competence of the cook.

146. Defendants have ordered special food for the non-resident cannery worker mess halls in accordance with the Local 37 union leaders' or cooks' desires without unreasonable budgetary restrictions.

147. The few whites in Local 37 ate with the Filipinos in the Local 37 mess. See testimony of David Yoshizumi.

#### HOUSING

148. In response to a written inquiry about employment, Hardy Parrish

in a letter dated January 25, 1971,  
wrote:

We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups. Another thing is the time element, most of the college boys do not get out of school early enough to fit in with our requirements.

Exh. 251. At the time of writing this letter, Mr. Parrish was a cannery foreman for WCP. Presently, he is cannery superintendent for CWF at Kenai, Alaska.

149. While defendants have made significant improvements in all worker housing, from 1970 to 1973, and while most of defendants' employees live in integrated bunkhouses, housing where non-whites predominate has generally been poorer than housing whites predominate. However, any differences in housing quality are not attributable to the race

of the occupants. Instead, differences are attributable to the following industrial circumstances:

A. Workers are generally housed according to job department and time of arrival. The larger cannery worker bunkhouses are not opened up during the preseason, but rather, are prepared within a few days of the anticipated beginning of the salmon run at each location which is when the cannery crews arrive. By this time, most other employees have already begun working, are housed, and there are few, if any, spaces available except in the cannery worker bunkhouses.

B. Since cannery workers are housed for the shortest period of time (during the summer), they do not need the better insulated buildings required for the noncannery worker employees who



arrive at the cannery earlier and stay later.

C. Generally, persons working in different departments do not work the same shifts.

#### INDIVIDUAL INSTANCES

150. In May of 1977, Moses Friendly, who is of Alaska Native descent, applied to defendants in writing for a summer clerical job, but was not hired.

151. In May of 1976, Jimmie Akanakyak, who is of Alaska Native descent, applied to defendants in writing for a storekeeper job in 1976, but was not hired in that job that year.

152. In February of 1977, Kim Tsijui, who is of Japanese descent, applied in writing for a waitress or clerical summer job, but was not hired in any job.

153. Ed Daba, who is of Filipino descent, applied on April 30, 1976, in

writing for a job as tender deckhand, as a machinist trainee or in another noncannery worker job, but was not hired. At the time of his application, all noncannery jobs had been filled.

154. Orlando Bucsit, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle and at 88 East Hamlin for a job on a tender in 1980, but was not hired in that job.

155. Richard Gurtiza, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle for a job which was about to open up on a tender part way into the 1977 season. He was not hired in that job. However, after the season was over Joseph Brindle allowed Richard Gurtiza to work on a tender for the seven-day trip south to Seattle.

156. In May of 1971, Clark Kido, who is of Japanese descent and was a student, applied at East Hamlin for a carpenter job, machinist job or other noncannery worker job orally and in writing, stating he could be available in mid-May, by arranging to complete his final exams early. In late April or early May of 1975, Mr. Kido similarly applied for interim employment. At that time Mr. Kido had been laid off as a full-time structural engineer at Boeing. Both times he was instructed no openings existed. Mr. Kido previously worked for defendants as a cannery worker. The jobs for which he applied, however, required pre-season availability and were filled in early spring.

157. Carlos Garces, who is of Mexican descent, applied in writing and orally in March of 1976, asking for any job at Ekuk or at any other cannery.

Mr. Garces had no experience, had an educational background in mechanical engineering but did not so state on his application. However, Mr. Ekern, with whom Mr. Garces spoke at the time he applied, did not ask Mr. Garces his qualifications. His status at the time of application was that of student.

158. Charles Tangalan, who is of Filipino descent, felt uncomfortable applying for a noncannery job because he thought Filipinos who worked in the cannery were supposed to be on the cannery crew. In addition, he felt he would be unable to get a job outside the cannery because he was not related to other company employees. Thus, he did not apply for other jobs.

159. Frank Atonio, who is of Samoan descent, inquired orally of Wards Cove cannery foreman Ray Landry regarding machinist jobs on a Sunday in 1973. He

inquired orally at the end of the 1973 season of Wards Cove Cannery superintendent Joseph Brindle for a machinist, carpenter or tender job; and orally at the end of the 1973 season to the Ward Cove bookkeeper Jerry Steele concerning a tender or clerical job but was not hired at that time. Mr. Atonio did not disclose any qualifications, and he was not asked about qualifications. He did not follow through with a written application, and his inquiries came at a time when the jobs had been filled for the season. Mr. Atonio was employed in noncannery jobs (beachgang and tender deckhand) in 1979 and 1980. His applications for these jobs were made preseason. He was rehired for the 1981 season for a job as a tender deckhand at the Kenai facility but quit before the boat departed.

160. In 1966 or 1967, during the canning season, Mike Eddie Antonio, who is of Filipino descent, orally inquired of the Red Salmon beach boss, Vern Jones, about how one went about getting a beach gang job. In 1966 or 1967, Mr. Antonio orally asked the Red Salmon head machinist how one goes about getting a machinist's job.

161. In 1973, Ronald Barber, who is of Filipino descent, was a student, and worked seasonally for various canneries, orally asked Ward Cove (cannery worker) foreman Salvador del Fierro for a quality control, clerical, storekeeper or machinist helper job, but was not hired for these jobs. Mr. Barber's requests were directed at an employee without hiring authority for those jobs. The inquiries were made during the season when those positions were already filled.



162. Andy Pascua, who is of Filipino descent, worked at Red Salmon in 1970 and 1971 but did not apply for a machinists job during those years. Mr. Pascua did inquire of a Red Salmon employee as to how one would go about getting such a job. Mr. Pascua's inquiry, however, was directed at any employee with no hiring power.

163. Lester Kuramoto, who is of Japanese descent, worked as a cannery worker at Ward Cove Cannery during the summers of 1970, 1971, 1972 and 1973 and worked as a cannery worker at Bumble Bee cannery during the summer of 1971. He applied orally in 1971 at 88 East Hamlin for any job.

164. Gene Viernes, who was of Filipino descent, worked at Red Salmon during the summers of 1969, 1971, and 1972 and at Ward Cove during the summers of 1966, 1969 and 1973. In 1973, Mr. Viernes

was fired for dropping and driving over canned fish he was transporting with the fork lift. In 1977, he orally inquired of Alec Brindle about getting hired as a cannery worker for that season, but was not hired.

165. William T. Pascua, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1971-1972 seasons. While at Red Salmon, Mr. Pascua wanted a clerical or quality control job, but did not ask for one because he believed that Andy Pascua and Gene Viernes had unsuccessfully inquired about such jobs.

166. Benjamin Tabayoyon, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1969-1971 seasons. During those seasons he inquired of the machinists and fishermen how they got their jobs.

167. Eugene Baclig, who is of Filipino descent, worked at Red Salmon during the 1969-72 seasons and at Ward Cove Cannery during the 1973 season. He did not apply for jobs other than a cannery job because the upper level jobs appeared to him to be all white.

168. Phillip Fujii, who is of Japanese descent, worked at Wards Cove Cannery during the summer of 1972. He was interested in a machinist job, but did not apply because he did not know what qualifications were necessary and what openings existed. Also, he did not see any Japanese or other non-whites working at Wards Cove, and overheard other employees say that one had to have connections or past experience to receive a high paying position.

169. Randy del Fierro, who is of Filipino descent, worked as a cannery worker for Wards Cove Packing at Wards

Cove Cannery in the 1970, 1972 and 1973 seasons; he worked at Alitak in the summer of 1971. Mr. del Fierro's grandfather, Salvador del Fierro, was foreman at Wards Cove Cannery in 1970, 1972 and 1973. Mr. del Fierro did not apply for an upper level job because he was told by members of his crew that job segregation was "just the way it was". Ct. Rec. 710 at 2, 11. 30-31. In addition, he saw few minorities occupying positions other than cannery worker positions.

170. Curtis Lew, who is of Chinese descent, worked at Wards Cove Cannery during the 1972 and 1973 seasons. He felt he was qualified for jobs other than as a cannery worker, but never told anyone about his qualifications because he did not believe there was any way he could advance due to the lack of posted openings and racial imbalance among the jobs.

171. Joaquin Arruiza, who is of Filipino descent, worked at Bumble Bee Cannery during the 1971, 1972 and 1973 seasons, and was interested in jobs outside the cannery crew. However, he never saw a written announcement, and no one informed him of promotional opportunities.

172. Allen Lew, who is of Chinese descent, worked at Wards Cove Cannery during the summers of 1972 and 1973. At that time, he was a full-time student at the University of Washington and not available for preseason work. Mr. Lew did not know how the defendants employed persons in the upper level jobs. It was Mr. Lew's impression that he would have been qualified for quality control, tenderman, and bookkeeper positions, but he remained a cannery worker.

## DISCUSSION

### JURISDICTION:

As stated earlier, this action challenges employment practices by WCP, BBS, and CWF under Title VII and under Sec. 1981. Except for CWF, exhaustion requirements have been met or waived, Zipes v. Trans World Airlines, \_\_\_ U.S. \_\_\_, 50 U.S.L.W. 4238 (Feb. 23, 1982), and jurisdiction exists in this court. With respect to the Title VII claims against CWF at Alitak and Ekuk, Judge McGovern dismissed all such claims, and the Ninth Circuit affirmed the dismissal because the claims were time barred. Atonio v. Ward Cove Packing Co., Inc., 703 F.2d 329, 331 (9th Cir. 1982). Plaintiffs urge in their Supplemental Final Argument that since WCP and BBS are essentially joint venturers, the two should be liable for any Title VII claims against CWF. However, this court is bound



by the Ninth Circuit's ruling affirming the dismissal of the claims in question. Accordingly, the court may not now utilize the joint venture theory to find liability on claims which no longer exist.

#### BURDEN OF PROOF:

At the outset, it should be noted that Section 1981 "does not embody the same broad, prophylactic purpose as does Title VII". Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 537 (9th Cir. 1983). Therefore, a plaintiff suing under Sec. 1981 must show intentional discrimination to establish a prima facie case. Id. Under Title VII, however, there are two theories of liability, the "disparate treatment" model and the "disparate impact" approach. A prima facie "disparate impact" case may be established without any proof of intentional discrimination.

Instead, where a business practice, which is neutral on its face, is shown to have a significant, adverse impact upon a class protected by Title VII, the plaintiff has made out a prima facie case, and the burden of proof shifts to the defendant to show that the practice is justified by "business necessity". Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981). Thus, good intent is not a defense in "impact" cases. Gay, 694 F.2d at 537. Under the "disparate treatment" mode, certain individuals are singled out, and treated less favorably than others based upon race, religion, sex or national origin. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977).

Treatment cases, like Sec. 1981 claims, require proof of intentional racial discrimination. Gay, 694 F.2d at

537. While the "burden of proof" shifts in "impact" cases, in "treatment" actions the burden which shifts to defendant after establishment of a prima facie case is only a burden of "production". It is clear the burden of persuasion remains with the plaintiff. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); Gay, 694 F.2d at 537, n.4. Prima facie disparate treatment (and Sec. 1981) is established by proof of facts sufficient to support an inference of intentional discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). But see, United States Postal Service v. Aikens, \_\_\_ U.S. \_\_\_, 103 S. Ct. 1478, 1482 (1983) (when a defendant fails to persuade the district court to dismiss for lack of a prima facie case, the factfinder must decide whether defendants' conduct was intentionally discriminatory regardless of whether

plaintiff really made out a prima facie case).

It must be decided whether the disparate treatment or the disparate impact theory, or both, applies to plaintiffs' Title VII claims in this action. If both apply, it must be decided whether both apply to all aspects of the action. Plaintiffs argue that both models of liability are applicable. Defendants counter that only the treatment theory is appropriate here since the allegations are of wideranging discrimination. Until recently, the answer to this question was relatively easy. In Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981) the court found that the impact model only applied to "objective" employment practices:

It is apparent, however, that the creation of jobs that are exempt from the Washington personnel law cannot be equated

with such well-defined objective employment practices as personnel tests or minimal physical requirements. Classification of certain jobs as "exempt" only meant that the University had wider discretion to establish the employee salaries. Subjective employment decisions may result in discrimination, but the use of subjective criteria is not per se illegal. [Citation omitted.] The gravamen of Heagney's complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that Heagney was required to prove disparate treatment.

Accord, O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982). As recently discussed in Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 & n.4 (9th Cir. 1983), there is a split among the courts of appeal on the applicability of the impact model to subjective employee selection practices, and the Heagney approach is consistent with holdings in the Fourth, Fifth, Eighth, and Tenth

Circuits. See, e.g., Pope v. City of Hickory, N.C., 679 F.2d 20, 22 (4th Cir. 1982); Pouncey v. Prudential Insurance Co. of America, 668 F.2d 795, 800-01 (5th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982). However, after Heagney was decided, in Wang v. Hoffman, 694 F.2d 1146, 1147 (9th Cir. 1982), the court of appeals took a contrary position to Heagney without citation to that case. The Wang majority concluded that "to prevail on his [impact] theory, Wang need only demonstrate the lack of objective criteria and a disparity in job promotions." Id. at 1148. The Moore court, supra, 708 F.2d at 481-82 recognized that the law in this circuit is unsettled, but did not find it necessary to resolve the rule at that time. While the Wang approach may find support from



the Sixth Circuit, Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 95 (6th Cir. 1982), until the Ninth Circuit by en banc opinion specifically overrules Heagney and its progeny, this court is bound by its rule since it predates Wang.

The conclusion that subjective decisionmaking is not susceptible to the impact approach does not dispose of the impact model for all areas of this case. Rather, there are aspects of the Wang case which survive the Heagney rule and bear upon issues before this court. That is, to the extent there is a language skills requirement (speaking English) for the at-issue jobs, such a requirement arguably should be deemed "objective" and is therefore properly addressed by impact analysis, since on its face, it would have a disparate impact on minorities. While this issue is not squarely addressed by the parties, it is the conclusion of this

court that given the nature of the cannery business, defendants met their burden of proof in demonstrating business necessity for a language requirement in upper level jobs. Specifically, the industry labors under the scrutiny of strict health regulations. The slightest mistake in calibrating can size or in retort management, for example, could result in a threat of wide-spread botulism, a disease fatal to humans. Fishermen who are unable to quickly communicate with one another may place themselves and others in great peril during stormy ocean weather. There is insufficient time and personnel for exhaustive training in this unique seasonal industry which deals with highly perishable food products.

Another area which must be analyzed separately from the intentional discrimination model concerns the pervasive incidence of nepotism at the

canneries. Recently, the Ninth Circuit Court of Appeals held that a shareholder preference plan in which shareholder ownership was concedely limited to persons of Italian ancestry and were either members of the family or close friends of a current shareholder was susceptible to impact analysis. Bonilla v. Oakland Scavenger Co, 697 F.2d 1297, (9th Cir. 1982). Particularly, this was so because the company in Bonilla tied preferential wages and job assignments to ownership of its stock. Consequently, the undisputed nepotistic preference plan was a condition of employment. Id. See, also, Gibson v. Local 40, Supercargoes & Checkers, Etc., 543 F.2d 1259, 1268 (9th Cir. 1976) (evidence of purpose to discriminate is unnecessary where employee is hired solely because of his relationship to other employees). Relatives of whites

and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications. In addition, plaintiffs' nepotism figures failed to differentiate those persons who became related through marriage after starting work at the canneries. Consequently, the nepotism which is present in the at-issue jobs does not exist because of a "preference" for relatives. Id.<sup>1</sup>

1. Plaintiffs' evidence established that some nonwhites were hired in cannery positions through Local 37 due to relationship with other union cannery workers. However, these positions are not in question, and this evidence has little, if any, bearing upon the at-issue jobs. The Union has not been named as a defendant and the named defendants may not be held vicariously liable for union conduct. General Building Contractors Association, Inc. v. Pennsylvania, et al., 102 S. Ct. 3141, 73 L. Ed.2d 835 (1982).

Having concluded that the language requirement and incidence of nepotism do not separately constitute impact violations of Title VII under the circumstances presented by this action, both must nevertheless be considered singly and collectively together with plaintiffs' evidence of defendants' failure to post openings, general lack of objective job qualifications, lack of a formal promotion procedure, and the practice of rehiring past employees in their old jobs to determine whether an inference of intentional discrimination has been raised. The court would further note that should plaintiffs prove that they were prevented from obtaining seniority because of defendants' discriminatory hiring practices, the rehire practice must then be separately evaluated to determine whether the effects of the past discriminatory hiring

practices (if established) was perpetuated through the rehire practice. Presumably, in such a case, the rehire practice could constitute a separate Title VII violation, regardless of whether defendants acted with a discriminatory purpose. See Gibson, 543 F.2d at 1268. Accord, Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982). For reasons to be discussed, infra, such an analysis is inapplicable here.

SKILLS:

As earlier stated, all at-issue (non-cannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman
7. Tallyman
8. Laundry
9. Gasman
10. Roustabout



11. Store Help
12. Stockroom Help
13. Assistant                      Caretaker  
    (winter      watchman      and  
    watchman's assistant)
14. Machinist Helper/Trainee
15. Deckhand
16. Apprentice  
    Carpenter/Carpenter's  
    Helper

It may be that under a different factual setting, some of the positions which this court finds to be skilled, e.g., truckdriving on the beach, fit into the category of jobs which require skills that are readily acquirable by persons in the general public under Hazelwood School District v. United States, 433 U.S. 299, 308 & n.13 (1977). However, what is readily acquirable under the circumstance of a full-year operation such as the setting in Teamsters, supra, is not readily acquirable in the salmon cannery industry.

With respect to the machinist helper/trainee; apprentice carpenter, and carpenter's helper; and deckhand

positions, although such positions are essentially unskilled, preseason availability is a necessary qualification.

#### STATISTICS:

Plaintiffs rely upon two types of statistics, ones which allegedly show that non-whites were under-represented in the upper-level jobs when compared with the percentage of non-whites in the available labor supply claimed by plaintiffs and "comparative" statistics which show a pattern of job segregation throughout the cannery work forces.

When full-year, fixed location employment is at issue, the population of some portion of the surrounding community is normally taken as the labor supply. Hazelwood School District v. United States, 433 U.S. 299 (1977). However, defining an employer's labor supply is a question of fact, Williams v. Owens-

Illinois, Inc., 665 F.2d 918, 927 (9th Cir. 1982), and courts "must be flexible in defining the relevant labor market". Domingo v. New England Fish Co., 445 F. Supp. 421, 433 (W.D. Wash. 1977).

Here, as in Domingo, plaintiffs incorrectly assume that the historical general hiring percentages in the industry as a whole mean that defendants hired nonwhites in the same percentage as their availability in the labor market. Id. However, the evidence does not support such a conclusion because of institutional factors which greatly distort the racial composition of the workforce. Id. The most significant example is the circumstance that Local 37, which dispatches non-resident cannery workers, is almost entirely Filipino. Id.

Stated differently, this court is unable to assign significant probative

value to plaintiffs labor supply statistics because the plaintiffs' data base premise does not reflect the important factor that Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state defendants draw their workforce.

Plaintiffs' statistical evidence showed significant disparities between the at-issue jobs and the total workforce at the canneries. Such comparative statistics are highly probative of discrimination pattern or practice where, as here, the positions enumerated at page 63 are essentially unskilled or involve skills that many persons possess or can easily learn. Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981). See, also, Moore v. Hughes Helicopters, Inc., supra, 708 F.2d at 483. Thus, the court concludes that plaintiffs establish a

prima facie case of intentional discrimination with respect to the positions enumerated at page 63. Nevertheless, defendants satisfied their burden of production and plaintiffs failed in their ultimate burden of persuasion for the reasons earlier stated and for the reasons discussed infra. Of particular significance to the court in making this finding, was the lack of evidence of early and formal applications, to be distinguished from oral inquiries. I have excluded from my consideration the positions of winter watchman and winter watchman's assistant since those positions are not seasonal. Consequently, the latter two positions would not be available to students, and evidence of other class interest was not presented.

Relying upon O'Brien v. Sky Chefs, Inc., 670 F.2d 865, 867 (9th Cir. 1982),

plaintiffs argue that their evidence was also sufficient for a prima facie showing with respect to the at-issue positions which this court has found to be skilled. This is so, it is asserted, because subjective decisionmaking strengthens an inference of discrimination, and requiring a prima facie showing of class qualifications when qualifications are unknown would be an insurmountable burden. However, the Sky Chefs case did not involve skilled positions. If special skills are required for a job, as here, "the proxy pool must be that of the local labor force possessing the requisite skills." Moore v. Hughes Helicopters, Inc., supra, 708 F.2d at 482 & n.5. In addition, the experts agreed that many at-issue jobs in the present case require the rather unique and necessary "qualification" (to be distinguished from a "skill") of



preseason availability. Plaintiffs' own evidence establishes that plaintiffs were generally aware of this important qualification. Finally, for the reasons previously stated, this is not a promotion-from-within case.

Having concluded that plaintiffs' statistics have little probative value with respect to the skilled positions, it must be determined whether the strength of the nepotism evidence, absent defendants' rebuttal evidence, together with plaintiffs' evidence of racial comments and individual instances is sufficient to establish, prima facie, a pattern or practice of discriminatory treatment in hiring, promoting, paying, and/or firing. Without the strength of highly probative statistics, plaintiffs' case must largely rise or fall upon the strength of the inference from the evidence of individual instances. The

elements are set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973). To establish individual instances of discriminatory treatment, when statistics are insufficient for a prima facie case, generally an individual should show that he belongs to a racial minority, that he applied and was qualified for the position sought, he was rejected, and after the rejection, the employer continues to seek applications. Id. While the McDonnell-Douglas elements are not an "inflexible formulation", Teamsters, 431 U.S. at 358, for determining the elements of a prima facie case or the inference weight to be assigned the collective individual instances, it nevertheless provides some guidance. Here, it is clear that plaintiffs belong to various racial minorities. At this juncture, however, the only evidence of preseason

application, other than oral inquiries, was the February, 1977, written application by Kim Tsuji, a student. She was seeking a summer position. One of the two jobs about which she inquired was generally year around (clerical); the other was unskilled. Ms. Tsuji did not disclose any qualifications on her application.

Oral inquiries to a foreman by anyone interested in a job are not treated as applications in the cannery industry. Plaintiffs appeared to have understood this. Gene Viernes, in his deposition at 18, stated in response to a question about Mr. Viernes' oral inquiries,

[The foreman] gets bored by hundreds of people everyday, I was treated as one such person.

Not only is it asserted that defendants discriminated in individual instances of filling vacancies, but plaintiffs also seek to buttress their

prima facie case with evidence that various class members were "deterred" from applying for better jobs. Several plaintiffs testified they did not apply for "at-issue" jobs because they believed defendants discriminated. At the outset, it should be noted that the test for purposeful discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates. Lewis v. Tobacco Wkrs. Intern. Union, 577 F.2d 1135, 1143 (4th Cir. 1978). "Basing recovery on that fact is an improper consideration." Id. Nevertheless, under Teamsters, 431 U.S. at 365,

The ["whites only"] message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices--by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his

responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Plaintiff's burden at the remedy stage of proving that he would have applied for the job had it not been for an employer's practices is a difficult burden, Id. at 368, and at this junctive, the liability stage, the evidence is insufficient to meet that burden. However, plaintiffs' evidence must nevertheless be considered at this point as a factor buttressing the inference of a pattern of discrimination in plaintiffs' prima facie case.

Accordingly, while significant probative value may not separately be assigned to plaintiffs' statistical evidence, or the testimony regarding individual instances including deterrence, and the evidence of other

circumstances including nepotism, nevertheless if the presentation in these various areas is considered collectively, plaintiffs have raised a marginal inference of discriminatory treatment in hiring, promoting, paying, and firing with respect to the skilled jobs. This court is compelled to conclude, however, that defendants have met their burden of production in showing defendants' motivation was not based upon discriminatory animus. Plaintiffs have not met their ultimate burden of persuasion, and have not established that defendants' conduct was pretextual.

As earlier noted, this court finds defendants labor supply data to be significantly more probative. Under the circumstances of this case, the census data is the most comprehensive source of information correlating race, residence, and occupations in the geographical areas



from which defendants draw their employees. Defendants' statistics which do not utilize plaintiffs' theory of counting "re-hires" have greater probative value under the circumstances of this case. Plaintiffs not only count rehires during successive seasons, but at successive canneries within the same season. Thus, an employee who holds the same job for ten years could be counted twenty times. Relying upon Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981), plaintiffs maintain that eliminating the rehires narrows the statistical base and allows defendants to perpetuate the results of earlier discrimination. However, in this circuit, as in the Second Circuit (Bethlehem Steel Corp., supra), for the rehire evidence to be probative, it must be established that past discriminatory

hiring practices existed. See Gibson, 543 F.2d at 1268. Indeed, the facts in Grant v. Bethlehem Steel Corp. differed dramatically from those in this case in a number of respects. Of fundamental importance, in Grant it was undisputed that the defendant had a long history of race discrimination in hiring. Id. at 1017. Second, in Grant, plaintiffs submitted evidence that persons who were automatically rehired possessed bad safety records which would have excluded them from rehiring in a merit-based hiring system. Id. at 1018. Such is not the case here. Courts have emphasized that statistics must be free from methodologic problems which undermine the reasonableness of any inference to be drawn from such statistics. Teamsters, 431 U.S. at 340, n.20.

Finally, under the facts of this case, given the high perishability of the

inexperience, and whites hired were paid no more than nonwhites.

The evidence further showed that plaintiffs' oral inquiries were not applications, and the inquiries were generally made of persons without hiring authority. Typically, applications were made too late in the season for the preseason jobs and the applicants were otherwise unavailable due to school schedules or other personal preferences. At this juncture, the court is unable to find a practice of deterrence. The instances of "race labeling", e.g., "Filipino Bunkhouse" were not unique to white speakers, but this terminology was also routinely used by the nonwhites. While such conduct is hardly to be applauded, under the circumstances, it is not persuasive evidence of discriminatory intent. This court is also unable to find that nonwhites were singled out because

of race with respect to rules against fraternization with the women or with respect to "menial" jobs such as grasscutting.

In sum, defendants have met their burden of production, both with statistical and other evidence, and plaintiffs have failed in the burden of persuasion with respect to the skilled at-issue jobs.<sup>2</sup>

#### HOUSING:

Plaintiffs' evidence of segregated housing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Particularly persuasive was Exhibit 251, a letter dated January 25, 1975 by Hardy Parrish,

---

2. The 1974 conciliation agreement between the EEOC and CWF, Red Salmon Cannery, and WCP was a negotiated settlement, and not an admission by defendants of liability. The agreement is entitled to little weight. Domingo v. New England Fish Co., 445 F. Supp. 421 n.1 (W.D. WA 1977).

which correspondence is set out in relevant part in Finding No. 148. Defendants' evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus. At the outset, the court would note that while Parrish is presently a cannery superintendent for CWF at Kenai, at the time he wrote the offensive letter, he was a cannery foreman, and therefore, not responsible for company policy. Nor does the evidence otherwise support a finding that Parrish was articulating company policy. In addition, defendants established that workers arriving preseason and staying post-season required better insulated housing. Defendants' further evidence showed that workers are housed departmentally because the various departments worked the same shifts. For example, fishermen necessarily come in

and out of their bunkhouse during the nights. To arrange the housing nondepartmentally results in more workers awakening and preparing to leave for work while others are trying to sleep. Of course, for the reasons stated earlier, the department of cannery workers is predominantly non-white. Thus, the cannery worker housing was predominantly non-white. Defendants' evidence of housing assignment by time of arrival and by crew sufficiently dispels the inference that defendants were motivated by discriminatory animus, and plaintiffs have failed in their ultimate burden of persuasion and of showing pretext.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. It is not efficient or economically feasible to open all bunkhouses preseason to assign workers



arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time. Title VII does not require that a seasonal employer be put to the expense of winterizing summer housing when bunkhouse assignment by date of availability makes such an expense unnecessary. Having found an absence of discriminatory treatment or impact in housing, this court need not reach the question of whether an employer may legitimately "award" or entice with better housing skilled workers who must live on the employment location for a greater length of time than unskilled workers.

MESSING:

Plaintiffs evidence of segregated messing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Defendants' evidence, however, sufficiently dispels

the inference that defendants were motivated by discriminatory animus and plaintiffs have not proved pretext. Local 37 members eat in the Local 37 mess. The quality and quantity of food served in the mess halls is the responsibility of the cook in the mess hall. The complaints about the food generally are attributable to matters of personal taste.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. Defendants operated under the Local 37 contract which provides for a separate culinary crew for the Local 37 crew. Filipino and Asian persons were "overrepresented" in Local 37. Of course, an employer-union agreement which permits an employer to discriminate is not immune to race discrimination claims. Williams v. Owens-Illinois, Inc.,

665 F.2d 918, 926 (9th Cir. 1982). See, also, General Building Contractors Assoc., Inc. v. Pennsylvania, et al., 102 S. Ct. 3141 73 L. Ed.2d 835 (1982). Nevertheless, as stated above, the testimony was that the few whites in Local 37 ate with the Filipinos in the Local 37 mess, and the culinary crew simply acceded to the wishes of the older workers who preferred the traditional food that was served. Consequently, it was the conduct of the union and not the conduct of defendants which caused the pattern of messing along essentially racial lines.

#### CONCLUSION

Defendants have not discriminated on the basis of race in the allocation of at-issue unskilled jobs. In addition, defendants did not discriminate in the hiring, firing, promoting, or paying in the at-issue skilled positions.

Similarly, defendants have not discriminated on the basis of race in housing its employees or in feeding these employees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 31st day of October, 1983.

---

JUSTIN L. QUACKENBUSH,  
United States District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO,	)	
et al.,	)	
	)	
Plaintiffs,	)	NO. C-74-145M
	)	
vs.	)	ORDER CORRECTING
	)	"OPINION FOLLOWING
WARDS COVE PACKING	)	NONJURY TRIAL"
COMPANY, INC.,	)	AND DIPECTING
et al.,	)	CORRECTION OF
	)	"JUDGMENT"
Defendants.	)	
	)	

Defendants request correcting this court's Opinion at Finding 148 (p. 47 at 1.17) to list Mr. Parrish's occupation as purchasing agent and to strike the language listing Mr. Parrish's occupation as foreman. The Opinion is corrected by deleting the last two sentences in Finding 148, and by inserting instead, the following language: "At the time of writing this letter, Mr. Parrish was



employed at WCP (Red Salmon) but did not have a specific title." While Mr. Parrish is listed as a purchasing agent on Exhibit A-76 at 1551, according to Mr. Parrish's deposition he was assigned various jobs, without the benefit of a particular job title. See, generally, Ct. Rec. 242 at 5-8. The only testimony concerning his job, is found in Mr. Parrish's deposition. This correction does not alter the court's conclusion at page 70 of the Opinion, that Mr. Parrish was not responsible for company policy.

Finding No. 134 of the Opinion at 43 is corrected to delete "1. Pile driver" from the list of unskilled positions. The only testimony with respect to this position shows the job to be skilled. See Affidavit of Alex W. Brindle at 36, paragraph 142. The job of "pile driver" is the same as the position "pile buck"

which this court found to be skilled. See Opinion at 34, Finding No. 131. The court would also agree Finding 134 bears correcting to the extent defendants did not stipulate to the finding that the positions of apprentice carpenter and carpenter's helper were unskilled. Nevertheless, this court will not disturb its finding that these two positions are unskilled.

The following errors are also noted: At page 2, line 2 "1974" is corrected to "1971". At page 70, line 15, "1975" is corrected to "1971".

Plaintiffs' Motion To Correct The Judgment to add the definition of the certified class is also GRANTED. The Clerk of the Court is directed to modify the Judgment by adding the following paragraph pursuant to Judge McGovern's corrected Order Certifying Class at Ct. Rec. 138, p. 3:

The plaintiff class in this case is defined as all nonwhites who are now, will be or have been at any time since March 20, 1971 employed by Wards Cove Packing Company, Inc., or Bumble Bee Seafoods Division of Castle & Cooke, Inc., in either company's Alaska fishing or canning operations, or by Columbia Wards Fisheries at its Alitak, Alaska or Ekuk, Alaska fishing or canning operations.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 6th day of December, 1983.

JUSTIN L. QUACKENBUSH,  
United States District Judge

Frank ATONIO, Eugene Baclic, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Feb. 6, 1985.

Decided Aug. 16, 1985.

Abraham A. Arditi, Northwest Labor & Employment Law Office, Seattle, Wash., for plaintiffs-appellants.

Douglas M. Duncan, Douglas M. Fryer, Seattle, Wash., for defendants-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before CHOY, ANDERSON and TANG,  
Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The named plaintiffs in this class action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, Wards Cove Packing Company, Inc. ("Wards"), Castle & Cooke, Inc. ("Castle"), and Columbia Wards Fisheries ("Columbia"), charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any time since March 20, 1971, employed at any one of five canneries. The individual canneries under scrutiny are Wards Cove and Red Salmon (operated by Wards), Bumble Bee

(operated by Castle), and Ekuk and Alitak (run by Columbia).

The Title VII claims against Wards and Columbia were dismissed for lack of jurisdiction early in the proceedings. This court affirmed the dismissal as to Columbia, but reversed the decision as to Wards. Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329 (9th Cir. 1983). On remand, and following a bifurcated liability trial, the district court held for defendants. The class appeals.

#### BACKGROUND

The five canneries are located in remote and widely separated areas of Alaska. They only operate for a short period each year, during the summer salmon runs. For the remainder of the year they lie vacant. The salmon runs themselves are inherently unpredictable. Due to this fact, the number of canning lines to operate at each facility may vary



from year to year, and in any given year a particular facility may not operate at all. Correspondingly, the number of employees needed to staff a particular cannery in any given year varies with the size of the salmon run. As early and as much as possible each winter, the companies attempt to gauge the size of the anticipated fish run for the upcoming season, and likewise the number of employees that will be needed. In making this assessment, management relies in part on forecasts provided by the Alaska Department of Fish and Game and the Fisheries Research Institute at the University of Washington. Despite these efforts, the actual fish run frequently varies to a considerable degree from the forecasts.

Each year the actual cannery operations begin in May or June, a few weeks before the anticipated fish run,

with a period known as the preseason. Workers are brought in to assemble the canning equipment, repair the facilities from the winter damage, and generally prepare the entire cannery for the onset of the canning season. The district court found that many preseason job positions require a variety of skills and skill levels, and that there is too little time during the preseason to train unskilled workers for the skilled jobs.

Shortly before the fishing begins, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, are the individuals who staff the actual canning lines. The cannery worker position is unskilled. These workers remain at the cannery as long as the salmon run produces fish to be canned, and they are guaranteed payment for a minimum number of weeks if the run proves to be a short one. In turn, when

the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by postseason workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Since the fish runs themselves are of short duration, cannery operations are often characterized by intense work and long hours. All the while, the Food and Drug Administration monitors the canning process closely, to ensure a safe consumer product. Basically, the canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to company-owned boats called "tenders," which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four

cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time/temperature requirements established by the FDA, and the cans are inspected to ensure that proper seals are maintained on the top, bottom and sides.

In addition to the cannery workers, each cannery staffs a variety of job classifications. Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, storekeepers, bookkeepers, beach gangs for dock yard labor and construction, etc.

The nature of the industry is such that most of the jobs are seasonal and of short duration. The few employees that can be considered permanent or year-round consist of certain management and office personnel who staff the home offices in Seattle and Astoria, Oregon in the winter, and several machinists, carpenters and tendermen who maintain the winter shipyard in Seattle. The remainder of the employees needed for the summer canning season are hired beginning in the first few months of each year.

Due to the geographical realities, the companies must hire the necessary employees from various area, primarily Alaska and the Pacific Northwest. Nearly all employees are transported to and from the canneries by the companies each year, where they are housed and fed throughout the season. A few Alaska Native employees

are able to reside in villages located near some canneries.

During their tenure, the appellants were primarily employed as cannery workers, the lowest-paid positions at the canneries. Appellants' discrimination complaints center on the fact that nearly all cannery worker positions are filled by nonwhites, while the higher-paying job classifications are predominantly white. This disparity, appellants allege, is due to hiring and promoting practices that allow intentional discrimination and produce a discriminatory impact as well. To illustrate these charges, appellants launched a wide-scale attack on the employee selection methods and the housing and messing practices used by the companies.

Among the practices challenged is the apparent lack of objective qualifications for many job



classifications, and the use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job. Each different job classification naturally requires the officer to consider the needs peculiar to that job. The district court found that the various job classifications at the cannery are not fungible, and that the most important qualifications for many of them, excluding cannery worker positions, are skill and/or experience. The court also found that the necessary skills are not readily acquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court found that preseason availability is a necessary

qualification for many of the positions, but that it is never a requirement for cannery worker jobs.

The appellants also attacked the recruitment of employees for different jobs through separate channels. The great majority of cannery workers are hired from native villages in Alaska and through a primarily Filipino ILWU local in Seattle. Consequently, the cannery worker department is staffed almost entirely by these ethnic groups. Openings in other positions are not posted at the canneries, and the companies do not promote from within during the season. Instead, the companies fill other positions each year through applications received during the off-season at the mainland home offices, through re-hiring previous employees in those positions, and through word-of-mouth recruitment. Appellants also

allege that nepotism is rampant in the canneries, with relatives of white company employees being given preference in hiring. Finally, appellants allege that nonwhites are segregated from whites in housing and messing, and that that bunkhouses and food provided for the nonwhites is far inferior to that provided for whites.

In holding for the defendant companies, the district court evaluated the mass of evidence introduced by both sides, including conflicting statistical data. The court analyzed all of appellants' claims for intentional discrimination, concluding that the companies had successfully shown nondiscriminatory motivations. The court refused, despite appellants' arguments to the contrary, to evaluate all of the claims under the disparate impact model of Title VII, relying on authority from

this circuit. A few claims were subjected to disparate impact scrutiny, however, and the court again found for the defendants. Before this court, the appellants challenge these findings and raise a host of subsidiary issues.

#### ANALYSIS

##### I. Columbia Joint Venture Claims

[1] Wards and Castle operate Columbia as a joint venture. Earlier in these proceedings, we affirmed the dismissal of Title VII claims against Columbia because they were not filed within the prescribed time limits and were, therefore, time-barred. See Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329, 332 (9th Cir. 1983). Appellants now assert that dismissal of the claims against the joint venture for procedural reasons does not affect the liability of the joint venturers as to those claims. Therefore, argue

appellants, because they could have sued either or both of the joint venturers without suing the joint venture, the Title VII claims against Columbia can be asserted against Wards and Castle, both of which were timely sued on separate discrimination charges.

We have no trouble agreeing that general common law agency principles, including joint and several liability, are applicable in Title VII cases. So too, however, are basic procedural and jurisdictional principles applicable. The controlling fact here, which appellants ignore, is that the Title VII claims against Columbia were not filed in time to grant jurisdiction. Nor were they ever filed against Wards or Castle in their capacity as joint venturers for Columbia. The claims were properly dismissed as untimely, and they simply no longer exist. Appellants cannot now

evade the jurisdictional prerequisites by bringing these claims in through the back door.

## II. Intentional Discrimination

[2, 3] The district court correctly recognized that while a plaintiff suing under section 1981 must always prove intentional discrimination, such is not always the case with Title VII. Of the two Title VII theories of liability, only disparate treatment requires a showing of intentional discrimination in order to establish a prima facie case. The alternate theory, disparate impact, requires no proof of intent and, logically enough, good intent is not a defense in impact cases.

[4] Due to their inherent similarities, we can treat section 1981 and Title VII disparate treatment under one intentional discrimination analysis. The plaintiff in such a case has the



initial burden of proving a prima facie case of intentional discrimination. If successful, the burden of production then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the plaintiff's rejection. If the defendant carries this burden, the plaintiff can still prove by a preponderance of the evidence that the legitimate reasons offered were a pretext for discrimination. The plaintiff always has the burden of persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256, 101 S.Ct. 1089, 1093-1095, 67 L.Ed.2d 207, 215-217 (1981); Kimbrough v. Sec. of U.S. Air Force, 764 F.2d 1279, 1283 (9th Cir. 1985). In practical application, this allocation of burdens works to the effect that "after plaintiff's prima facie case and defendant's 'articulation,' the trier of fact decides the question of

discrimination based on the entire case." Kimbrough, at 1283.

[5] "After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determinations." Kimbrough, at 1281; Anderson v. Bessemer City, \_\_\_ U.S. \_\_\_, \_\_\_, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). The "'district court must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes." Casillas v. United States Navy, 735 F.2d 338, 342-343 (9th Cir. 1984) (quoting United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)).

Before addressing appellants' several allegations of error, it should

be noted that appellants have relied heavily on this circuit's decision in Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984), modified, 742 F.2d 520 (1984). Domingo was originally brought as a companion case to the action at bar. Because of pre-trial delays in the instant action, including the earlier appeal, Domingo proceeded to trial and appeal much faster. The facts in Domingo are strikingly similar to the facts at bar, as are the claims of the plaintiffs. Both cases involve racial discrimination charges in the Alaska canning industry. Domingo resulted in a decision in favor of the class, and the present plaintiffs have cited that decision extensively. We do not, however, feel compelled to blindly apply stare decisis. Although the similarities between the cases are striking, the differences between them are far more determinative.

In Domingo, we noted that the liability phase of the trial lasted one and one-half days, with the defendant company not challenging the plaintiffs' statistics nor rebutting the plaintiffs' prima facie case. 727 F.2d at 1433-1434. In essence, the defendants in Domingo did not defend against the allegations of discrimination. Conversely, the defendants at bar are different canning companies and they have defended themselves against these charges vigorously. The liability phase of the trial took twelve days, with the defense introducing witnesses and statistical evidence contrary to that of the plaintiffs. Taking these important factual differences into consideration, Domingo is entitled to no more or no less precedential value than the many other Ninth Circuit cases in this area of law.

A. Hiring, Promoting, Paying,  
Firing

[6] When confronting the bevy of evidence below, the district court began its intentional discrimination inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: skilled and unskilled. Both the plaintiffs and defendants had introduced labor-market statistics in an effort to bolster their contentions. For reasons discussed below, the district court rejected plaintiffs' labor-market statistics, while crediting those of defendants. In addition, the plaintiffs introduced comparative statistics, which the court only credited in scrutinizing the unskilled jobs group.

Taking each group in turn, the court first found that the unskilled jobs were fungible, and, thus, comparative statistics were appropriate for use in

establishing a prima facie case of discrimination. Since the comparative statistics showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had put on a prima facie case with respect to the unskilled jobs. Nevertheless, for reasons discussed below, the court found that defendants had met their burden of production in showing motivation other than discriminatory animus, and that plaintiffs had failed in their ultimate burden of proving pretext.

Moving on to the skilled positions, the district court had more difficulty in finding a prima facie case of intentional discrimination, because the plaintiffs' statistical evidence had been discredited. The court did find a "marginal" prima facie case, but only by way of combining all of plaintiffs'



evidence and claims of nepotism, individual instances of alleged discrimination, deterrence, failure to post openings, general lack of objective qualifications, lack of a formal promotion procedure, re-hiring past employees in their old jobs, and the discredited statistical evidence. The court found that none of these had significant probative value when considered alone. In conclusion, the court held that defendants had met their burden of production and that plaintiffs had failed to meet their ultimate burden of persuasion.

Appellants contend that the district court erred in not giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of whites and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the

relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more than non-whites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.<sup>1</sup>

[7] After carefully reviewing the record, we cannot say that the district court was clearly erroneous in making

---

1. The district court's analysis of appellants' nepotism claims applies equally under both the disparate impact and intentional discrimination inquiries. Disparate impact is discussed infra.

these findings. The Supreme Court has recently reiterated our role in reviewing these findings of fact. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, \_\_\_ U.S. at \_\_\_, 105 S.Ct. at 1512, 84 L.Ed.2d at 528 (emphasis added). The fact finder's account of the evidence, concluding that there were legitimate and nonpreferential reasons for the hires of friends and relatives, is entirely plausible in light of the whole record. Consequently, we will not disturb it.

For the same reasons, we will not overturn the district court's findings with respect to alleged individual instances of discrimination. A number of plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. Using the four-part test of McDonnell Douglas as a guideline,<sup>2</sup> the

2. It was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973), that a plaintiff can establish an inference of discrimination by meeting four criteria. First, that the individual belongs to a Title VII protected class. Second, that he or she applied and was qualified for an open position. Third, that he or she was rejected. Finally, that after the rejection, the employer continued to seek applicants. See also Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir. 1985).

Appellants accuse the district court of misapplying the test, by using it too stringently. They are incorrect,

district court did not give greater credit to the alleged instances because it found that the respective plaintiffs had not been hired for nondiscriminatory reasons. Primarily, the district court found that the individuals had made oral inquiries, which were not considered applications, or that the applications were untimely.<sup>3</sup> The court also found that

apparently due to a misreading of the court's opinion. Contrary to the accusation, the court clearly said that the McDonnell Douglas elements are not an inflexible formulation, but rather provide some guidance.

3. Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquiries were not considered an application unless followed up by a written application to the home office during the winter. Conversely, because the companies generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nonwhites differently in these respects.

some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. There is ample evidence in the record to support the district court's findings regarding these individual claims.

Nevertheless, appellants argue that the fact that the companies use separate hiring channels, word-of-mouth recruitment, and fail to announce vacancies should serve to excuse appellants from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications. We disagree. Appellants take this idea from a discussion of damages issues in Domingo. 727 F.2d at 1445. We find that discussion inapposite because, unlike the Domingo plaintiffs, the appellants have not first established



wide-ranging discrimination. Appellants failed to convince the district court that they had been intentionally discriminated against, and they may not rely on Domingo in this manner to establish what they have failed to prove. We cannot find the district court clearly erroneous.

Appellants also contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. As previously indicated, the district court accorded these statistics, which compare the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or those available for preseason work.

[8] This court has recognized the importance of statistics as circumstantial evidence of discriminatory

intent. In the same breath, however, the court often admonishes that statistics are "inherently slippery" and the weight given to them depends on "proper supportive facts and the absence of variables." Spaulding v. University of Washington, 740 F.2d 686, 703 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984) (quotations omitted). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous standard of review. Gay v. Waiters' and Dairy Lunchmens Union, 694 F.2d 531, 550 (9th Cir. 1982); see also Allen v. Prince George's County, Md., 737 F.2d 1299, 1303 (4th Cir. 1984).

Appellants fail to recognize the importance of minimizing variables to increase the reliability and significance

of statistical evidence. In Domingo, we said that "[i]n many cases, it is necessary to consider the qualifications of the applicant pool because without that information, no inference of discrimination may be drawn; the lack of minority representation in the workforce might simply be due to a lack of qualified applicants." 727 F.2d at 1436. Although we permitted the Domingo district court to credit comparative statistics in that case, it was because sufficient evidence of discriminatory treatment had already been presented, and the statistics were not necessary to raise an inference of discrimination. Id. We allowed them merely to demonstrate the consequences of the defendant's already-proven discriminatory hiring practices.

The appellants at bar, however, have not previously presented sufficient evidence of discriminatory intent, and

they desperately need these comparative statistics credited for that very purpose. This is a precise example of the type of putting the cart in front of the horse of which we were wary in Domingo. Appellants cannot use these general, unrefined statistics to meet their burden with respect to skilled positions. This case clearly illustrates why courts and litigants must carefully examine proffered statistics to avoid the distortion of fact that they have the potential to produce.

The percentage of nonwhites employed in the Alaska salmon canning industry during the relevant time period was approximately 50 percent. Of these, approximately 88 percent were Alaska Natives or of Filipino descent. It is undisputed that the racial composition of cannery workers is predominantly nonwhite, and, therefore, those positions

are primarily held by Filipinos and Alaska Natives. We know that this is because four of the canneries, Ekuk excluded, have a contract with Local 37 in Seattle to supply cannery workers, and we know further that Local 37 membership is predominantly Filipino. We also know that the Alaska Native cannery workers primarily come from sparsely populated areas immediately adjacent to four of the canneries.

Yet, the district court found that Filipinos constitute only about 1 percent of the population and labor force in the geographical region from which the canneries draw employees. Further, the district court found that Alaska Natives constitute only a small portion of the overall general population in the section of Alaska where canneries are located, which includes predominantly white city populations. From this comparison, it

could easily be deduced that Alaska Natives and, more particularly, Filipinos are significantly overrepresented in the cannery worker jobs.

On the other side of the coin, the district court found that the available general labor supply in the relevant geographic area was approximately 90 percent white. And, it is undisputed that the majority of at-issue jobs were held by whites.

With this background in mind, it is obvious that the institutional factors involved tend to distort the racial composition of the work force. Thus, when considering the skilled positions, statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, cannot serve to raise an inference that the segregation is attributable to intentional



discrimination against any particular race. They can, as Domingo pointed out, serve to demonstrate the consequences of discriminatory practices which have already been independently established.

When jobs are not fungible, as in this case, statistics must reflect the qualifications of the applicant pool in order to be probative and credible on the discrimination issue. The fact that the qualifications themselves are subjective does not obviate this requirement as a matter of law. In this case, the district court found that the qualifications most needed for the skilled positions were skill and/or experience in performing the respective jobs. Certainly, there is a degree of subjectivity present when an employer chooses the applicant that he or she feels is best qualified. But it is not necessary that plaintiffs' statistics show that they were the best qualified.

It is enough that they reflect the percentage of qualified nonwhites--in this case, those with some skill and/or experience in the desired jobs and who were available to begin work in the preseason. Whether or not such statistics have sufficiently reflected the minimum qualifications actually imposed by the employer so as to raise an inference of intentional discrimination is then a question of fact left for the fact finder. For these reasons, we do not hesitate to find that the district court did not clearly err in assigning appellants' comparative statistics little probative value as to the skilled jobs.

The appellants further allege the district court erroneously held that the labor-market statistics offered by the defendant companies rebutted the appellants' prima facie case of intentional discrimination. The district

court, however, did not so hold. It found defendants' labor-market statistics more probative than those of appellants because appellants' statistics had counted re-hires of employees during successive seasons and at successive canneries within the same season. Important considerations apart from the statistics played a determinative part in the court's conclusion that defendants had met their burden of production. As previously discussed, the court concluded from the evidence that all applicants were evaluated according to job-related criteria, albeit subjectively, and that oral inquiries and untimely applications served to eliminate hopeful employees, including some plaintiffs. Thus, appellants are incorrect in their basic assertion.

We further cannot find the district court clearly erroneous in its findings

concerning job-related criteria. Appellants assert that the criteria were never imposed. The district court found otherwise. In so doing, the court took certain listed job qualifications verbatim from the defendants' pre-trial order. These lists, however, merely supported the court's conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. After reviewing the record, we cannot conclude that the district court was clearly erroneous. See Anderson v. Bessemer City, \_\_\_ U.S. at \_\_\_, 105 S.Ct. at 1510, 84 L.Ed.2d at 527.

[9] Appellants also urge reversal on the ground that the district court's findings failed to address the discriminatory nature of separate hiring channels and word-of-mouth recruitment. We decline to do so. Findings of fact are

adequate if they are explicit enough on the ultimate issues to give this court a clear understanding of the basis of the decision and to enable us to determine the grounds on which the trial court reached its decision. Nicholson v. Board of Educ., etc., 682 F.2d 858, 866 (9th Cir. 1982). See also Barber v. United States, 711 F.2d 128, 130-131 (9th Cir. 1983); United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir.) cert. denied, \_\_\_ U.S. \_\_\_, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983); De Medina v. Reinhardt, 686 F.2d 997, 1011-1012 (D.C. Cir. 1982).

The ultimate fact, that there existed no pattern or practice of discrimination in hiring, promoting, paying and firing, is supported by the numerous subsidiary findings of the district court. Throughout the findings, the court discusses the manner in which

the canneries hire and promote employees. Included are findings about the fact that cannery workers are hired routinely through Local 37, but that skilled positions are filled through individual screening. It would have been convenient had the district court labelled certain findings as addressing "separate hiring channels" and "word-of-mouth" recruitment. It is inconsequential in the end, however, because it is abundantly clear from the district court's opinion that these challenged practices were included in the ultimate finding. The court stated, "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria." Thereafter, in concluding the case, the court encompassed all of the claims when it said "defendants did not



discriminate in the hiring, firing, promoting, or paying . . ." The decision of the district court will not be disturbed.

B. Housing

[10] The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The appellants claimed that nonwhites, particularly Filipinos, were segregated from whites and placed in inferior bunkhouses because of racial discrimination. The district court found that appellants had established prima facie case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the appellants had failed to prove pretextual. Specifically, the court found that the employees were housed by time of arrival and by crew.

The record contains ample evidence to affirm the district court's conclusion. While none of the cannery housing appears to have been luxurious, some bunkhouses were undoubtedly better than others. Testimony showed that workers who arrived at the canneries first, during the colder preseason period, were housed together in the best-insulated buildings. When the cannery workers eventually arrived, they were housed together in the remaining bunkhouses. This system enabled the companies to maintain only the amount of housing needed at any particular time. Furthermore, the workers were housed primarily by crew, thereby minimizing any inconvenience occasioned when different departments worked different shifts. While some mixing of crews did occur, the cannery workers were all housed together,

regardless of race.<sup>4</sup> Based on our review of the record, we do not find the district court clearly erroneous.

### C. Messing

[11] Cannery workers were also fed separately from the remainder of the work force. The appellants alleged that this was due to racial discrimination. The district court agreed that they had established a prima facie case of intentional discrimination, but that the defendants had met their burden of production and the appellants had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed as a "traditional" oriental menu.

---

4. The only exception to this appears to have been the few female cannery workers, who were housed apart from male cannery workers. White female cannery workers were housed with nonwhite female cannery workers, just as white and nonwhite male cannery workers were housed together.

The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these findings, and we cannot find them clearly erroneous.

### III. Disparate Impact

[12] From the beginning, appellants have insisted that their claims also be analyzed under the disparate impact model

of Title VII. Impact analysis exemplifies the broad prophylactic purpose of Title VII, which is designed to achieve equality of employment opportunities by removing artificial barriers that act as "built-in head winds" against the progress of minority groups. Connecticut v. Teal, 457 U.S. 440, 447-448, 102 S.Ct. 2525, 2530-2531, 73 L.Ed.2d 130, 137-138 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 431-432, 91 S.Ct. 849, 853-854, 28 L.Ed.2d 158, 164-165 (1971). To make out a prima facie impact case, the plaintiff must show a facially neutral employment practice that has a "significantly discriminatory" impact upon a Title VII protected group. Connecticut v. Teal, 457 U.S. at 446, 102 S.Ct. at 2530, 73 L.Ed.2d at 137. It is not necessary to prove discriminatory intent. International Brotherhood of Teamsters v. United States, 431 U.S.

324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396, 415 n. 15 (1977); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983). The burden of proof then shifts to the defendant to establish that the practice has "a manifest relationship to the employment in question," Griggs, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165, or is justified by a business necessity, Moore, 708 F.2d at 481. "The employer may also rebut the employee's prima facie case by showing the inaccuracy of the employee's statistics." Id. (citing Contreras v. City of Los Angeles, 656 F.2d 1267, 1273 (9th Cir. 1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982)). The plaintiff may still prevail by showing "that the employer was using the practice as a mere pretext for discrimination," Connecticut v. Teal, 457 U.S. at 447, 102 S.Ct. at 2530, 73



L.Ed.2d at 137, "or that the employer's purpose could be served by selection devices with less discriminatory impact," Moore, 708 F.2d at 481 (citing Dothard v. Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (1977)).

[13] The district court applied impact analysis to appellants' claims of nepotism,<sup>5</sup> but declined to do so for the balance of appellants' discriminatory hiring and promoting claims. The court noted a conflict in this circuit concerning whether impact analysis is proper in situations where employees are challenging the subjective nature of employment practices. Caught in the

5. The district court also used impact analysis to test an English language requirement and in an alternate holding in favor of defendants on the housing and messing claims. The language requirement finding is not challenged on this appeal, and for reasons discussed infra we will not review the court's impact discussion regarding housing and messing claims.

bind, the district court wisely chose to follow the precedent authority by refusing to use impact analysis across the board. Appellants challenge this legal decision, and we must attempt to resolve the problem de novo.

Griggs v. Duke Power, supra, was the first case to recognize that Title VII outlaws practices that are fair in form, but discriminatory in operation and impact. From this case grew the disparate impact model, challenging employment practices that are neutrally applied (thus making discriminatory intent difficult to prove), but that nevertheless operate to discriminate in effect. Examples of the type of objective, outwardly neutral employment practices clearly susceptible to impact scrutiny are pre-employment tests that adversely affect people of certain cultural backgrounds and pre-selection

requirements such as height and weight restrictions. See Griggs, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Dothard, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

By and large, however, appellants have not challenged a specific facially neutral practice. Rather, appellants have mounted a broad-scale attack against the gamut of defendants' subjective employment practices. We have firmly stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. Kimbrough, at 1284. At the same time, it is certain that subjective practices and decisions are not illegal per se. Id.; Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981). The gray area of conflicting opinion is whether the close scrutiny of these practices can or should

take the form of a disparate impact analysis.

In Heagney, upon which the district court relied, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be equated with practices such as personnel tests or minimum physical requirements. Thus, impact analysis was inappropriate. 642 F.2d at 1163. O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982), followed on the heels of Heagney, and once again held that the lack of well-defined criteria must be challenged under disparate treatment.

The conflict in this circuit arose with the decision in Wang v. Hoffman, 694

F.2d 1146 (9th Cir. 1982), which challenged the manner in which the Army Corps of Engineers hired and promoted employees. Without cite to Heagney or O'Brien, our court applied impact analysis to the plaintiff's claim that the subjective selection process used by the Corps provided inadequate guidelines and could be manipulated in order to eliminate certain candidates. Although a language skills requirement--traditionally subject to impact analysis because it is objective and facially neutral--appeared central to the court's concerns, the discussion reflects a deeper worry that the language requirement was added intentionally to disadvantage the plaintiff. 694 F.2d at 1149. Unfortunately, this speaks to intent, which is irrelevant in impact cases. Nevertheless, Wang seems to support the appellants' arguments at bar.

See also Peters v. Lieuallen, 746 F.2d 1390 (9th Cir. 1984).

In subsequent cases we have recognized the conflict between Heagney and Wang, and expressed opinion without resolving the question. See Moore, 708 F.2d 475 (9th Cir. 1983) (although unnecessary to decision, disparate treatment focus better suited to analysis of subjective decision making). Domingo, 727 F.2d 1429 (9th Cir. 1984) (disparate treatment more appropriate approach because defendant's practices were not facially neutral); Spaulding, 740 F.2d 686 (9th Cir. 1984) (holding impact analysis only applicable to specific, facially neutral policies, rather than a full-scale challenge to an employer's practices, of which lack of well-defined criteria is not facially neutral).

We choose to follow the Heagney line of authority because we believe it to be



the correct view.<sup>6</sup> Without question, employment discrimination is an evil which continues to plague our society and must be battled. Title VII was designed for that purpose, to make race (or sex, etc.) an irrelevant factor in hiring decisions. It must be remembered, however, that the disparate impact model was not explicitly provided for in the statute, but rather was first enunciated in Griggs as a mode of implementing the broad purposes of Title VII. While it has been argued that subsequent congressional actions have served to implicitly ratify the creation of disparate impact,<sup>7</sup> it is

---

6. Moreover, we agree with the district court. Principled institutional decision-making requires that we adhere to Heagney, the first in line. We believe the other panels acted improperly in ignoring Heagney. It is the law of this circuit by which we are bound until overruled by appropriate en banc proceedings.

7. See Helfand & Pemberton, The Continuing Vitality of Title VII Disparate Impact Analysis, 36 Mercer 939, 944-954 (1985).

no less clear that Congress was concerned about mandating color-blindness with as little intrusion into the free market system as possible. Courts have noted that it was deemed essential that employers remain free to set employment qualifications as they honestly saw fit, so long as those qualifications were not based on race, color, religion, sex, or national origin. See Griggs, 401 U.S. at 436, 91 S.Ct. at 856, 28 L.Ed.2d at 167; Contreras, 656 F.2d at 1277-78.

Presumably, therefore, the disparate impact model was created to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove. Were the facial-neutrality threshold to disappear or be ignored, the distinction between disparate impact and disparate treatment

would diminish and intent would become a largely discarded element. Rather than being an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such a result has been mandated by Congress or through Supreme Court interpretation of Title VII. Therefore, practices and policies such as lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.

Consequently, we hold that disparate impact analysis was correctly withheld by the district court when considering these claims.<sup>8</sup>

8. In addition to the conflict within this court, the circuit courts of appeals are split on the applicability of disparate impact analysis to subjective employee selection practices. Those which have applied impact analysis are the Fifth, Sixth, Tenth, Eleventh and D.C. Circuits. See Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Lasso v. Woodmen of World Life Ins. Co., Inc., 741 F.2d 1241 (10th Cir. 1984); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984). Those circuits which have said they will only apply impact analysis to specified objective employee selection practices include the Fourth, Fifth, Eighth, and Tenth Circuits. See EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983); Harris v. Ford Motor Co.,

[14] Appellants'

nepotism

allegations, which we have previously held proper for impact analysis, Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984), were properly so considered by the district court. As previously discussed, the court found that no pattern or practice of nepotism existed because there was no preference for relatives. We do not hold those findings to be clearly erroneous. In addition, we find appellants' remaining allegations of error, concerning re-hire preferences and termination of Alaska natives, to be without merit.

Accordingly, for the reasons set out in this opinion, the district court is

AFFIRMED.

651 F.2d 609 (8th Cir. 1981); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982).

Frank ATONIO, Eugene Baclig, Randy Del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,  
Ninth Circuit.

Nov. 19, 1985.

Before BROWNING, Chief Judge,  
GOODWIN, WALLACE, SNEED, KENNEDY,  
ANDERSON, HUG, TANG, SKOPIL, SCHROEDER,  
FLETCHER, FARRIS, PREGERSON, ALARCON,  
POOLE, FERGUSON, NELSON, CANBY,  
BOOCHEVER, NORRIS, REINHARDT, BEEZER,  
HALL, WIGGINS, and BRUNETTI, Circuit  
Judges.



## ORDER

Upon a vote of the majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment 768 F.2d 1120 is withdrawn.

## APPENDIX V

Frank ATONIO, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted En Banc  
Feb. 18, 1986

Decided Feb. 23, 1987

Abraham A. Arditi, Seattle, Wash.,  
for plaintiffs-appellants.

Douglas M. Fryer, Seattle, Wash.,  
for defendants-appellees.

Bill Lann Lee, Los Angeles, Cal.,  
Robert E. Williams, Washington, D.C., for  
amicis curiae.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, GOODWIN, WALLACE, SNEED, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, PREGERSON, and REINHARDT, Circuit Judges.

TANG, Circuit Judge:

We grant en banc review in this Title VII race discrimination case to decide two questions. First, we decide the procedure a panel should follow when faced with an irreconcilable conflict between the holdings of controlling prior decisions of this court. Second, we resolve that irreconcilable conflict, by deciding that disparate impact analysis may be applied to subjective employment practices. The district court declined to apply disparate impact analysis on the authority of Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981)

(practice of hiring without well-defined criteria cannot be subjected to disparate impact analysis) and chose to disregard the later decision in Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (lack of objective criteria for promotion can be analyzed for disparate impact). The Ninth Circuit panel that heard the appeal from the judgment for the employers in the instant case noted our conflicting decisions but held it was bound by Heagney because it expressed the "correct view" or, alternatively, because it was the decision "first in line." Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120, 1132 and n. 6 (9th Cir. 1985), withdrawn, 787 F.2d 462 (9th Cir. 1985).

[1] The panel's approach did not resolve the broader question of how future panels should decide a case controlled by contradictory precedents. We now hold that the appropriate

mechanism for resolving an irreconcilable conflict is an en banc decision. A panel faced with such a conflict must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished. Despite the "extraordinary" nature of en banc review, United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689, 80 S.Ct. 1336, 1339, 4 L.Ed.2d 1491 (1960), and the general rule that en banc hearings are "not favored," Fed.R.App.P. 35(a), en banc review is proper "when consideration by the full court is necessary to secure or maintain the uniformity of its decisions." Fed.R.App.P. 35(a)(1); see also American-Foreign Steamship, 363 U.S. at 689-90, 80 S.Ct. at 1339-40.

[2] Turning to the substantive question which produced our conflicting prior decisions, we note that this case arises out of the cannery workers'

allegations of both disparate treatment and disparate impact. Thus it affords us the opportunity to refine the analytic tools for the identification and eradication of unlawful discrimination. Specifically, we now determine that disparate impact analysis may be applied to subjective employment practices.

#### I. BACKGROUND

Former salmon cannery workers brought a class action suit charging three companies with employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982) and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). The class alleged both disparate treatment and disparate impact claims on behalf of minority persons. It alleged that the pronounced concentration of Asian and Alaska Native employees in the lowest



paying cannery worker and laborer positions and the relative scarcity of such minority employees in the higher paying positions proved disparate treatment of minority people. It also alleged that certain specific employment practices of the companies proved both disparate treatment of and disparate impact on minority people. The cannery workers challenged the companies' use of separate hiring channels for cannery workers from those used for the higher paying, at-issue jobs, as well as word-of-mouth recruitment, nepotism, rehire policies, and the lack of objective job qualifications.

The majority of cannery workers are hired from native villages in Alaska and through a local union of primarily Filipino members of the International Longshoremen's and Warehousemen's Union (ILWU) in Seattle. Consequently, cannery

workers are almost all members of these ethnic groups. All other positions are filled through applications received during the off-season at the mainland home offices, through rehiring previous employees and through word-of-mouth recruitment. These positions are held predominantly by white people. Another challenged practice, of particular relevance in our en banc review of this case, is the apparent lack of objective qualifications for many job classifications, and the resultant use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job.

In addition to the racial stratification of jobs, the cannery workers complain that even those

nonwhites who obtain positions with the companies are treated differently from whites. They allege that nonwhites are segregated from whites in housing and messing, and that the bunkhouses and food provided for nonwhites are far inferior to those provided for whites.

In holding for the defendant companies, the district court evaluated the evidence introduced by both sides, including conflicting statistical data. The court analyzed all the cannery workers' claims for intentional discrimination, and concluded that the companies had successfully shown nondiscriminatory motivations for their practices. Despite the cannery workers' contrary arguments, the court, relying on Ninth Circuit authority, refused to evaluate all of the claims under the disparate impact model of Title VII. The court subjected a few claims to disparate

impact analysis and again found for the defendants.

## II. ANALYSIS

### A. Title VII Liability

[3, 4] Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2) (1982), provides that:

It shall be an unlawful employment practice for an employer--

. . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

An employee may prove an employer's Title VII liability through a theory of disparate treatment or a theory of disparate impact. Proof of disparate treatment requires a showing that the employer intentionally "treats some

people less favorably than others because of their race, color, religion, sex, or national origin." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977). An illicit motive may be inferred in an individual discrimination claim when the plaintiff shows he is a member of a protected class who applied for, and failed to get, a job for which he was qualified and which remained open after his rejection. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). An illicit motive may be inferred in a class-wide discrimination claim from a sufficient showing of disparity between the class members and comparably qualified members of the majority group. Segar v. Smith, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), cert. denied, 471 U.S.

1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (citing Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854-55 n. 15).

A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15. Illicit motive is irrelevant because impact analysis is designed to implement Congressional concern with "the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (emphasis in original). In a class action suit, commonly known as a "pattern or practice" case, plaintiffs typically assert claims both of disparate treatment occasioned by



an employer's practices and of disparate impact produced by those practices. Segar, 738 F.2d at 1266. As the Supreme Court noted in Teamsters, a pattern and practice class action case, "[e]ither theory may, of course, be applied to a particular set of facts." 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15.

B. Impact Analysis in the Ninth Circuit

1. Conflict

Disparate treatment and disparate impact are but two analytic tools which may be used in the appropriate Title VII case to resolve the ultimate question, whether there has been impermissible discrimination by an employer. See, e.g., Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3d Cir. 1985). Despite the Teamsters language stating that either theory may be applied to a set of facts, courts have not uniformly interpreted the

scope of impact analysis.<sup>1</sup> Differences have arisen from the conflicting views of whether impact analysis can be applied to evaluate employment procedures or

1. The Second, Third, Sixth, Tenth, Eleventh and District of Columbia Circuits apply impact analysis to subjective practices and criteria. See, e.g., Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981); Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Lasso v. Woodmen of World Life Insurance Co., Inc., 741 F.2d 1241 (10th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); Coe v. Yellow Freight System, Inc., 646 F.2d 444 (10th Cir. 1981); Williams v. Colorado Springs School District No. 11, 641 F.2d 835 (10th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). The Fourth Circuit does not apply impact analysis to subjective criteria. See, e.g., E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); but see Brown v. Gaston County Dyeing

criteria different from the objective test and diploma requirement scrutinized in the seminal Griggs decision or the height and weight requirements analyzed

Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). The Fifth, Seventh and Eighth Circuits have reached conflicting results, sometimes applying impact analysis and sometimes refusing to apply it. See, e.g., Page v. U.S. Industries, Inc., 726 F.2d 1038 (5th Cir. 1984); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (applying impact analysis); contra Bunch v. Bullard, 795 F.2d 384, 394 (5th Cir. 1986); Vuyanich v. Republic National Bank, 723 F.2d 1195 (5th Cir.) cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); Pegues v. Mississippi State Employment Service, 699 F.2d 760 (5th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983); Carroll v. Sears Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir. 1982); Griffin v. Board of Regents, 795 F.2d 1281, 1288-89 and n. 14 (7th Cir. 1986) (refusing to apply impact analysis); contra Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.) cert. denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952,

in Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).<sup>2</sup>

This circuit has clearly held that subjective practices and decisions are not illegal per se. Heagney v.

104 S.Ct. 2155, 80 L.Ed.2d 541 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (refusing to apply impact analysis); contra Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed.2d 820 (1984).

2. See, e.g., Page v. U.S. Industries, Inc., 726 F.2d 1038, 1054 (5th Cir. 1984) (applying impact analysis to subjective employment practices in accord with Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) because "promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination."); E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) (allegedly discriminatory promotion policies could not be subjected to impact analysis because the subjective criteria did not amount to an "objective standard, applied evenly and automatically" as are a diploma requirement, a test or a minimum height or weight requirement).



University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981). At the same time, we have stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. Kimbrough v. Secretary of United States Air Force, 764 F.2d 1279, 1284 (9th Cir. 1985); Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981). The conflict in our decisions has developed because prior panels have not all agreed that the close scrutiny of subjective practices can or should take the form of a disparate impact analysis.

In Heagney, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be

equated with practices such as personnel tests or minimum physical requirements. Thus, although we had previously noted that both treatment and impact analysis may be applied, we held that impact analysis was inappropriate. Heagney, 642 F.2d at 1163. We followed Heagney in O'Brien v. Sky Chefs, 670 F.2d 864, 866 (9th Cir. 1982) and refused to apply impact analysis to an employer's lack of well-defined promotion criteria, noting that the lack of such criteria does not per se cause an adverse impact.

On the other hand, this court has applied impact analysis to subjective criteria in at least two cases. In Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982), which challenged the hiring and promotion policies of the Army Corps of Engineers, the panel held that a promotion system lacking objective criteria could be challenged for its



disparate impact, and in Peters v. Lieuallen, 746 F.2d 1390, 1392 (9th Cir. 1984), the panel held that impact analysis could be applied to subjective criteria used during interviews to screen candidates, but that the plaintiff must show that use of the criteria caused the adverse impact. See also Yartzoff v. Oregon, 745 F.2d 557, 558 (9th Cir. 1984) (impact analysis of subjective promotion criteria appropriate in age discrimination case, but plaintiff failed to offer proof of disparate impact).

In subsequent cases we have recognized the conflict between Heagney and Wang, but felt it unnecessary to resolve the question. See Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983) (noting that "[t]he law in this court is unsettled" stated disparate treatment focus well suited to analysis of subjective decision making);

Spaulding v. University of Washington, 740 F.2d 686, 709 (9th Cir.) (lack of well defined criteria facilitating wage discrimination better presented under disparate treatment model on the authority of Heagney, followed by a "but cf." citation to Wang), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984).

## 2. Resolution

We now hold that disparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class. The three elements of the plaintiffs' prima facie case are that they must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection

criteria and (3) show the causal relationship between the identified practices and the impact. We are persuaded that this holding comports with the express language of the statute, the intent of Congress as revealed in its discussions of the 1972 amendments, the enforcement agencies' interpretation, and the broad prophylactic purposes of Title VII.

### 3. Rationale

#### a. Statutory Language

We begin with the observation that Title VII proscribes all forms of employment discrimination. It does so without reference to either objective or subjective practices. Title VII states that it is an unlawful employment practice "to limit, segregate, or classify . . . employees or applicants for employment in any way." 42 U.S.C. § 2000e-2(a)(2) (1982) (emphasis added).

The Supreme Court construed this language as proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs, 401 U.S. at 431, 91 S.Ct. at 853. The Court developed the disparate impact model for proving discrimination in recognition of Congress' intent to remove "artificial, arbitrary, and unnecessary barriers to employment." Id. Although Griggs involved requirements of a high school diploma and an objective test, the opinion did not expressly limit impact analysis to such criteria.

#### b. Congressional Intent

There is considerable evidence that Congress endorsed the Griggs decision during discussion of amendments to Title VII in 1972. H.R.Rep. No. 238, 92d Cong., 1st Sess. 19, 24 (1971), reprinted in 1972 U.S. Code Cong. & Ad.News 2137,

2164; S.Rep. No. 415, 92d Cong., 1st Sess. 1, 14-15 (1971); Connecticut v. Teal, 457 U.S. 440, 447 n. 8, 102 S.Ct. 2525, 2531 n. 8, 73 L.Ed.2d 130 (1982); see Helfand and Pemberton, The Continuing Vitality of Title VII Disparate Impact Analysis, 36 Mercer L.Rev. 939, 948-54 (1985). The section-by-section analyses of the 1972 amendments submitted to both houses of Congress expressly stated that in areas not addressed by the amendments, existing case law was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972); Teal, 457 U.S. at 447 n. 8, 102 S.Ct. at 2531 n. 8. Thus, although Title VII was not amended specifically to extend disparate impact analysis to subjective practices, decisional law incorporated at that time included not only Griggs, but such cases as United States v. Bethlehem Steel Corp., 446 F.2d 652, 647-58 (2d Cir. 1971), which applied Griggs to invalidate

subjective hiring standards and procedures.

c. Enforcement  
Agencies' Interpretation

Additional authority for our decision to apply the disparate impact model is found in the announcement of the four agencies charged with enforcement of Title VII--the Equal Employment Opportunity Commission, the Office of Personnel Management, the Department of Justice and the Department of Labor--that the law requires application of the disparate impact model to all selection procedures whether subjective or objective. Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). The Uniform Guidelines on Employee Selection Procedures, adopted in 1978, define the procedures to which impact analysis applies as:

[a]ny measure, combination of measures, or procedure used as a basis for any employment



decision. Selection procedures include the full range of assessment techniques from . . . physical, educational, and work experience requirements through informal or casual interviews.

29 C.F.R. § 1607.16(Q) (1985).

Because the statutory language and legislative history support the administrative interpretation, the guidelines are "entitled to great deference," and can be treated as "expressing the will of Congress." Griggs, 401 U.S. at 434, 91 S.Ct. at 855.

d. Purpose of Title VII

Applying the tool of disparate impact analysis to subjective practices and criteria is necessary to fully implement the prophylactic purpose of Title VII to achieve equal employment opportunity and remove arbitrary and unnecessary barriers which have operated to favor white male employees over others. Teal, 457 U.S. at 451, 102 S.Ct.

at 2532-33; Teamsters, 431 U.S. at 364, 97 S.Ct. at 1869; Griggs, 401 U.S. at 431, 91 S.Ct. at 853. It is essential precisely because such practices will quite often lack any discriminatory animus. Subjective practices can operate as "'built-in headwinds'" for minority groups as readily as can objective criteria, Griggs, 401 U.S. at 432, 91 S.Ct. at 854, and these practices should likewise be exposed and eradicated when they cause adverse impact without proof of a redeeming business necessity. The Supreme Court has not held otherwise.

e. Furnco

There has been considerable discussion about the meaning of Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Some courts and commentators suggest the Supreme Court restricted the application of Griggs impact analysis to objective

criteria.<sup>3</sup> The majority of circuits, however, do not subscribe to this reading of Furnco and have applied impact analysis to subjective practices.<sup>4</sup>

The employment practice challenged in Furnco was the refusal to accept jobsite applications for bricklayers to reline blast furnaces with firebrick. Instead, the job superintendent hired only bricklayers he knew were experienced

---

3. See, e.g., Larson, 3 Employment Discrimination § 76.36 n. 90 (1984 & Supp. Nov. 1985) (collecting cases).

4. See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981) (a post Furnco decision in which, on virtually identical facts, the court held that word of mouth hiring should be evaluated as discriminatory treatment and for discriminatory impact. Id. at 1016-17); Bauer v. Bailar, 647 F.2d 1037, 1043 (10th Cir. 1981) ("Subjective hiring and promotion decisions, particularly where made in the absence of specific standards and guidelines[, ] may not go unexplained if there is a significantly disproportionate non-selection of members of a [protected] group. . . ."). See also cases cited supra, n. 1..

or who had been recommended by his foremen. Furnco, 438 U.S. at 570, 98 S.Ct. at 2946. In applying the McDonnell Douglas formula of disparate treatment the Court noted the case did not implicate employment tests previously treated in Griggs and Albemarle Paper Co. v. Moody, 422 U.S. 405, 412-13, 95 S.Ct. 2362, 2369-70, 45 L.Ed.2d 280 (1975) (Moody), or particularized physical requirements such as those discussed in Dothard, 433 U.S. at 329, 97 S.Ct. at 2726-27, and that it was not a pattern and practice case as was Teamsters, 431 U.S. at 358, 102 S.Ct. at 1866, Furnco, 438 U.S. at 575 n. 7, 98 S.Ct. at 2948-49 n. 7.

We do not read this footnote to preclude impact analysis of the claims presented in the case at bar. Clearly, the facts giving rise to allegations of discrimination may support a prima facie case of disparate treatment or disparate

impact. See, Teamsters, 431 U.S. at 336 n. 15, 102 S.Ct. at 1854-55 n. 15 ("[e]ither theory may, of course, be applied to a particular set of facts.") In other words, Furnco imposes no limitation on use of impact analysis beyond the restrictions inherent in demonstrating a prima facie case.

The Furnco plaintiffs identified a specific practice, but were unable to prove that the practice had an adverse impact on black bricklayers. 438 U.S. at 571, 98 S.Ct. at 2946. Because they failed to demonstrate disparate impact, they failed to establish a prima facie case of disparate impact, and thus, use of that analytic tool was inappropriate.

[5] In contrast, the plaintiffs in this case contend they are consigned to lower paying jobs by a system of racial segregation implemented through a variety of specific employment practices. The

statistics provide evidence of a significant disparate impact and the challenged practices are agreed to cause disparate impact. Thus, these plaintiffs are entitled to the application of impact analysis as an appropriate analytic tool to challenge the discriminatory effect of the companies' practices because they have satisfied the elements of the prima facie case: a significant disparate impact on a protected class, the identification of specific employment practices or selection criteria and a causal relationship between the identified practice and the impact.

#### f. Logic Supports Impact Analysis

Although the language of the statute and Congressional discussions of Title VII, as well as Supreme Court pronouncements are sufficient authority for the application of disparate impact analysis to subjective employment



practices, we should also note that we are unpersuaded by the defendants' objections to our decision based on appeals to logic or social policy. Defendants argue that there is a logical basis for a distinction between objective and subjective practices and for the correlative categorization of the analysis of the proof of impermissible discrimination. In their view subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus. They argue that only objective practices can be evaluated for disparate impact.

We disagree. Subjective practices may well be a covert means to effectuate intentional discrimination, as the defendants point out, but they can also be engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose

original purposes are undiscoverable. Subjective practices are as likely to be neutral in intent as objective ones.<sup>5</sup> If, in fact, the subjective practices are a "covert means" to discriminate intentionally, by definition intent will be difficult to prove. If the practices are the cause of adverse impact, the purposes of Title VII are well-served by advancing proof of adverse impact, thereby obviating the necessity of proving intent. Proof of intent where adverse impact can be shown may be not only unnecessary but undesirable because of the animus the process generates.

We also do not agree that only objective practices can be analyzed for

---

5. See D. Baldus and J. Cole, Statistical Proof of Discrimination § 1.23 (1980 & Supp. 1985) ("The logic of the disparate impact doctrine appears to apply to covert legitimate policies, no matter how discretionarily they are applied, as well as it does to overt nondiscretionary criteria.")

disparate impact. When we view employment practices from the perspective of their impact on a protected class, we are unable to see a principled and meaningful difference between objective and subjective practices. There is no bright line distinction between objective and subjective hiring criteria, because almost all criteria necessarily have both subjective and objective elements. For example, while the requirement of a certain test score may appear "objective," the choice of skills to be tested and of the testing instruments to measure them involves "subjective" elements of judgment. Such apparently "subjective" requirements as attractive personal appearance in fact include certain "objective" factors. Thus the terms merely represent extremes on a continuum, and cannot provide a line of demarcation to guide courts in choosing

the appropriate analytic tool in a Title VII discrimination case.

Finally, we think a distinction between subjective and objective practices serves no legitimate purpose. To the contrary, preserving the distinction could serve to encourage employers to abandon "objective" criteria and practices in favor of "subjective" decision making as a means of shielding their practices from judicial scrutiny. It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods. See Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985) ("Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews. . . . It could not have been the intent of Congress to provide

employers with an incentive to use such devices rather than validated objective criteria.").

g. Policy Considerations Support Impact Analysis

The defendants argue that the burden placed on an employer in an impact case is somehow made unduly onerous when the practices identified as having a disparate impact are subjective in nature. A class claim of disparate impact is essentially an allegation that a disparity in the position of nonwhites and whites, often proved through statistical evidence, is "the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business." Segar, 738 F.2d at 1267. As in a disparate treatment claim, the initial burden is on the plaintiffs. To establish a prima facie case of disparate impact, the plaintiffs must prove that a specific business

practice has a "significantly discriminatory impact." Teal, 457 U.S. at 446, 102 S.Ct. at 2530; Dothard, 433 U.S. at 329, 97 S.Ct. at 2726-27. To reiterate, plaintiffs' prima facie case consists of a showing of significant disparate impact on a protected class, caused by specific, identified, employment practices or selection criteria.

[6] Once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer. The crucial difference between a treatment and an impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer



defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. Moody, 422 U.S. at 425, 95 S.Ct. at 2375. The Supreme Court's decision in Burdine that the burden of persuasion always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 n. 5, 101 S.Ct. 1089, 1093 n. 5, 67 L.Ed.2d 207 (1981).

Precisely what the employer must prove will vary with the factors of different job settings, but "[t]he touchstone is business necessity." Griggs, 401 U.S. at 431, 91 S.Ct. at 853. In our view, proving business necessity is no more onerous in a case involving subjective practices than one involving objective practices, because in either case the employer is the person with knowledge of what his practices are and why he uses the methods and criteria he does, as well as the person with superior knowledge of precisely how his employment practices affect employees. See Segar, 738 F.2d at 1271; Pouncy v. Prudential Insurance Co., 668 F.2d 795, 801 (5th Cir. 1982). The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and to establish the causal connection between the practices and the impact.

Once a challenged practice which causes disparate impact is identified, it does not place an unfair burden to ask an employer to justify the challenged practice.<sup>6</sup> We emphasize that while proving business necessity may be "an arduous task," Bunch v. Bullard, 795 F.2d 384, 393 n. 10 (5th Cir. 1986), this burden will not arise until the plaintiff has shown a causal connection between the challenged practices and the impact on a protected class.

In weighing competing policy considerations urged by the defendants,

---

6. We note that a related concern is that the "impact model is not the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." Spaulding, 740 F.2d at 707. However, this is not such a case. The class has not simply complained about the overall consequences of a collection of unidentified practices; rather it has identified specific employment practices which cause adverse impact. These specific practices which cause adverse impact may be considered individually and collectively.

primary guidance is provided by the purpose of Title VII, namely to eradicate the existence and effects of discrimination in employment. Treatment and impact analyses are interpretive constructions intended to provide guidance in evaluating the evidence presented in discrimination cases so as best to effectuate Congressional intent. In this case, that intent is best realized by a decision to apply disparate impact analysis to subjective employment practices.

#### CONCLUSION

For the reasons discussed, we hold that disparate impact analysis can be applied to subjective employment practices. To the extent our prior decisions have held to the contrary they are expressly overruled.

We return this cause to the panel to reconsider the district court's

disposition of the plaintiffs' claims in light of this decision.

SNEED, Circuit Judge, with whom GOODWIN, WALLACE, and J. BLAINE ANDERSON, Circuit Judges, join, concurring separately:

I agree that en banc resolution of a conflict, such as existed with respect to Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), and Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982), is the appropriate means of unraveling a tangle of conflicting holdings in circuit law.

On the other hand, while I agree that the mere fact that an employment practice is subjective does not shield it from attacks under the disparate impact theory, my view of the problems this case presents is different enough from that of the majority that it is best to set forth in some detail both my summary of the

facts and my analysis of the law with respect to those facts. My thesis, in a nutshell, is that the disparate impact theory is designed to be applied to certain types of cases only. The majority opinion, although not holding otherwise, might unfortunately be read to suggest that the disparate treatment and disparate impact theories may be used interchangeably in any given fact situation. While this would read the opinion too broadly, it is certainly fair to say that the majority opinion provides no guidance in describing the circumstances to which each theory is applicable. This guidance is necessary to prevent the conversion of all, or substantially all, Title VII class actions into disparate impact cases.

I now turn to the facts which will be set out somewhat differently than in the majority opinion.



# I.

## FACTS

The five defendant canneries are located in remote and widely separated areas of Alaska. They operate for a short period each year, during the summer salmon runs, and lie vacant for the remainder of the year.

The cannery operations begin in May or June, a few weeks before the anticipated fish run, with a period known as the preseason. The companies bring in workers to assemble the canning equipment, repair winter damage to the facilities, and prepare the cannery for the onset of the canning season. Shortly before the fishing season, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, generally are unskilled individuals who staff the actual canning lines. These workers remain at the

cannery as long as the salmon run lasts; they are guaranteed payment for a minimum number of weeks if the run is shorter than usual. When the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by post-season workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Because the fish runs are of short duration, cannery work involves intense and long hours. The canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to companyowned boats, which transport the fish from the fishing grounds to the canneries. Cannery workers eviscerate the fish, remove the eggs, clean the fish, and place them in cans. Next, the cannery workers cook the salmon under precise time and temperature requirements established by the Food and

Drug Administration (FDA) and inspect the cans to ensure that proper seals are maintained on the top, bottom, and sides.

Because of their remote location, the canneries must be completely self-contained, employing individuals in a great variety of jobs. Machinists and engineers, for example, maintain the canning equipment. Quality control personnel conduct the FDA-required inspections and record-keeping. Boat crews operate transport boats. Other tasks require, for example, cooks, carpenters, store-keepers, bookkeepers, and beach gangs for dock yard labor and construction. Because of the brevity of the salmon runs, most of the jobs are of short duration. The few permanent employees either staff the home offices in Seattle, Washington and Astoria, Oregon in the winter, or maintain the winter shipyard in Seattle.

Another consequence of the canneries' location in remote areas is that the companies hire the necessary employees from various areas--primarily Alaska and the Pacific Northwest--and transport them to and from the canneries each year. They provide housing and mess halls at the canneries throughout the season.

Most of the cannery worker jobs, which are unskilled, are held by minorities. Most of the higher-paying jobs are held by caucasians. The plaintiffs presented statistical evidence demonstrating the breadth of this disparity. Relying on this evidence, they challenged the following hiring practices the canneries use in filling the higher-paying jobs at issue: (1) the use of separate hiring channels and word-of-mouth recruitment for skilled workers; (2) nepotism; (3) rehire policies; and

(4) the lack of objective job qualifications. They also alleged racial discrimination in the canneries' messing and housing practices.

The district court evaluated all of the practices under the disparate treatment model; it found for the defendants, holding that they had shown nondiscriminatory motivations for these practices. It also evaluated some of the practices, those it characterized as "objective," under the disparate impact model; it found for the defendants under this analysis also.

The panel to which this case was assigned agreed with the district court that disparate impact analysis should be applied only to "objective" factors. Its conclusion was based on Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), but conflicted with Wang v. Hoffman, 694 F.2d 1146 (9th Cir.

1982). See Atonio v. Wards Cove Packing Co., 763 F.2d 1120, 1132 & n. 6 (9th Cir. 1985).

As already mentioned, we granted en banc review to address the circumstances under which it is appropriate to employ the disparate impact analysis. Part II of this opinion sets forth an analytic framework for determining when the disparate impact approach should be used. Part III applies that framework to the facts of this case.

## II.

### ANALYTIC FRAMEWORK

The relevant section of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides:

It shall be an unlawful employment practice for an employer

... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his



status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Supreme Court's interpretation of this provision has identified two separate theories of recovery: disparate treatment and disparate impact. Put briefly, a plaintiff alleging disparate treatment must demonstrate intentional discrimination. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977). A disparate impact claim, on the other hand, does not require proof of discriminatory intent. Instead, it attacks "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." Id. at 336 n. 15.

The Supreme Court has not clearly articulated the types of cases to which

each of these theories should be applied. In Teamsters, for example, the Court said that "[e]ither theory may, of course, be applied to a particular set of facts." Id. One could conclude from this comment that both theories were applicable to all Title VII claims without regard to their specific nature.

This conclusion, however, is plainly inconsistent with the Supreme Court's disposition of Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). In that case, the Supreme Court expressly refused to apply disparate impact analysis. The plaintiffs were individual bricklayers who were not hired because they applied at the jobsite, rather than through the regular application process. The Supreme Court's explanation consisted of a footnote stating that the case was not similar to Griggs v. Duke Power Co., 401

U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (evaluating standardized tests under disparate impact analysis), Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (evaluating height and weight requirements under disparate impact analysis), or Teamsters (a class action disparate treatment case). See Furnco, 438 U.S. at 575 n. 7, 98 S.Ct. at 2948-49 n. 7.<sup>1</sup>

It should not be surprising that the lower courts have employed different explanations of this footnote in Furnco.

1. Comprehension of the court's treatment of the impact claim in Furnco is complicated by Justice Marshall's explanation. He argues that the Court's rejection of the impact claim was merely an affirmance of the circuit court's affirmance of the district court's rejection of that claim on the merits. 438 U.S. at 584-85, 98 S.Ct. at 2953 (Marshall, J., concurring in part, dissenting in part.) Because this explanation is not consistent with the explanation of the Court's own opinion, I refuse to rely on it.

Two basic explanations have emerged, one represented by Wang and the other by Heagney. The Heagney approach restricts the disparate impact analysis to objective practices; the Wang approach applies it to all practices.<sup>2</sup> I think

2. The decisions in other circuits in fact reflect a more complicated situation, with a variety of different positions. It is fair to say, however, that some courts apply disparate impact analysis only to practices closely akin to the counting, measuring, and weighing evident from the existing Supreme Court cases. See, e.g., Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188-89 (5th Cir. 1983) (Wisdom, J.) (refusing to apply disparate impact analysis to claims of discrimination in training, promotion, and classification of employees); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (per curiam) (refusing to apply disparate impact analysis to system allowing firing based on evaluations of supervisors). Other courts apply disparate impact analysis to any identifiable practice whatsoever. See, e.g., Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982) (per curiam) (applying disparate impact analysis to system allowing rehiring based on opinions of foremen); Clark v. Chrysler Corp., 673 F.2d 921, 927 (7th Cir.) (applying disparate impact analysis to word-of-mouth recruitment and discriminatory selection of hiring channel), cert.

both of these approaches ignore how the alleged practice functions. As a consequence, one is too broad and the other too narrow.

Moreover, the distinction between "objective" and "subjective" employment practices or criteria is not as clear as these cases suggest. A requirement, for example, that an applicant pass a qualifications test is "objective." On the other hand, hiring on the basis of good looks and appearance is by no means entirely "subjective." Specific aspects of these two criteria can be identified and to the extent so identified become "objective." Only an employment practice resting entirely on personal whim and caprice can be said to be wholly "subjective." In short, "subjective" and "objective" are only the extremes of a continuum, like night and day. I believe

denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982).

they are inappropriate tools for defining the bounds of disparate impact and disparate treatment analysis. Moreover, even "subjective" practices, as the majority points out, have the same capacity to cloak discrimination that in Griggs led the Supreme Court to create disparate impact analysis.

I think the key to understanding the proper spheres of disparate impact and disparate treatment analysis is found in the nature of the claims of discrimination. A brief recapitulation of the nature of the two forms of analysis demonstrates this point. To establish a prima facie disparate impact case requires that the practice be identified, that there exists an impact adverse to a protected class, and that the practice caused the adverse impact.

Obviously, the burden of establishing this prima facie case will



preclude certain claims from receiving disparate impact analysis. For example, the requirement that the plaintiffs identify a specific practice prevents plaintiffs from "launch[ing] a wide ranging attack on the cumulative effect of a company's employment practices." Spaulding v. University of Washington, 740 F.2d 686, 707 (9th Cir.) (quoting Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982)), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984). But cf. Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (applying disparate impact analysis to the end result of a hiring process, without requiring the plaintiffs to articulate which specific practices caused the impact in question). Absent this requirement, the disparate impact test would put on employers the burden of demonstrating the business necessity of

each facet of their employment decisions, even if the plaintiffs could demonstrate no disparate impact caused by some of those facets. See Pouncy, 668 F.2d at 801. Accordingly, the analysis requires the plaintiff to identify some specific practice; the defendant must show the business necessity of that specific practice.

The requirement of causation also prevents disparate impact analysis of certain claims. For example, a plaintiff's class consisting of children cannot state a cause of action against an employer merely because his recruiting practices designed to obtain quarry workers overlooked children. No significant number of children are qualified to be quarry workers. Because there are not a significant number of children so qualified, the employer's practices in recruiting quarry workers

cannot be said to have caused any impact on the children. At a minimum, then, the causation element requires demonstration by the plaintiff that significant numbers of the plaintiff class are qualified for the job. See, e.g., Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1019 (2d Cir. 1980) (noting that some members of the plaintiff class were clearly qualified, despite the employers' protestations to the contrary), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981).<sup>3</sup>

<sup>3</sup> I do not mean to say that plaintiffs must introduce statistical proof based on qualifications of applicants who have been rejected for the job. Obviously, the applicant pool itself could fail to represent adequately the number of qualified minorities because of discriminatory recruitment practices. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 330 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). Those

Once the plaintiff has established a prima facie case, the employer must either attack one of the three elements of the prima facie case or demonstrate that the practice is a "business necessity." The latter can be shown only when the practice is job-related and serves to help identify the qualities necessary to perform the work satisfactorily. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 333 n. 14, 97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

The disparate treatment structure is quite different. There the prima facie case typically requires that the

discriminatory recruitment practices themselves are subject to disparate impact analysis. But it is important to remember that a prima facie case that the recruitment practices in question have caused a disparate impact requires demonstration of a significant number of qualified persons overlooked because of the challenged practices.

aggrieved show (1) that he is a member of a protected class, (2) that he applied, (3) that he was rejected, and (4) that after the rejection the position remained open and applicants having qualifications similar to the aggrieved's continued to be accepted. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The burden then is on the employer to show that a non-discriminatory reason explains his conduct. See id. at 802-03, 93 S.Ct. at 1824-25. Thereafter, the aggrieved may attempt to show that the proffered explanation is pretextual. See id. at 804, 93 S.Ct. at 1825. The ultimate burden of persuasion remains on the aggrieved to show discriminatory treatment. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

The Supreme Court cases to date have applied disparate impact analysis only to practices akin to counting, weighing, and measuring, an even narrower limitation than the "objective"/"subjective" distinction some courts have adopted. I think the appropriate distinction can be more accurately delineated. As I see it, disparate impact analysis should be applied whenever the plaintiff claims that the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant. This differs from a treatment case, in which the plaintiff claims that, knowing the plaintiff's qualifications, the employer refused to hire him because of race or some other impermissible characteristic. A showing of discriminatory intent is extremely difficult, if not impossible, when an employer asserts that he did not hire an



individual because of a facially neutral requirement. Faced with this reality the Court in Griggs held that employers must justify such requirements under the business necessity test.

The crucial issue in any Title VII case is into which category the employer's alleged wrong properly fits. Has the employer allegedly failed by reason of some facially neutral employment practice to ascertain the qualifications of a protected class, or has the employer ignored the known qualifications for a discriminatory reason? The nature of the wrong as pleaded and proved determines the nature and extent of the plaintiff's burden. Because it would be futile in an impact case to require the plaintiff to show discriminatory intent, the plaintiff's burden principally is one of showing the "impact" of the practice. Proof of the

"impact" goes far toward establishing a failure to consider the qualifications of a substantial number of the protected class. At that point the employer's response logically can only be that the practice serves to ascertain a relevant job-related qualification; that is, the practice rests on business necessity.

This burden of showing a business necessity has no place if the plaintiff's grievance is that his qualifications, although available to and known by the defendant employer, have been ignored because of a discriminatory motive. To treat this as an impact case rather than a treatment case would relieve the plaintiff of the burden of establishing a discriminatory intent and impose on the defendant the burden of demonstrating that what he did was done because of business necessity. In the context of a treatment case, this would amount to

imposing the burden on the defendant to prove that he did not discriminate.

Thus, it is necessary to determine from the pleadings and the evidence the nature of each claim the plaintiff makes. Although it is true that neither impact nor treatment analysis can be tied irrevocably to a specific category of practices, it is also true that they properly cannot be employed interchangeably. It follows that in this case each claim must be analyzed to determine which type of analysis, impact or treatment, is proper. An employee, alleging only that the employer's failure to hire him is based on race or religion, cannot force the employer to prove that his failure was due to business necessity. This remains true even if the plaintiff shows that others of plaintiff's race or religion also had not been hired. The employee has alleged a

treatment case and the burdens are allocated as McDonnell Douglas and Burdine indicate. On the other hand, such an allocation is entirely inappropriate where the allegation is that the test employed by the employer disqualifies all applicants other than Protestants. This pleads an impact case.

Complications arise when the practices lend themselves to being alleged as the basis of either a treatment or impact case. Equally complicated are situations in which multiple practices are employed and some properly suggest impact analysis while other treatment analysis. In such situations, a court should evaluate each practice separately, applying the appropriate analysis to each practice. Guided by this analysis, I now proceed to examine the district court's

treatment of the plaintiff's claims in this case.<sup>4</sup>

4. I acknowledge that this position has not been articulated in the decisions of other courts that have examined similar questions. A brief survey of the law in other circuits reveals, however, that most of the decisions in this area are consistent with the approach I suggest.

The Second Circuit has applied disparate impact analysis to employment systems that relied on subjective employee evaluations. Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (2d Cir. 1984). Under my approach, such decisions would often be subject to the disparate impact analysis.

The Third Circuit applied disparate impact to invalidate a test that partially based promotions on administrative skills. In that case, the employer had a practice of assigning whites to jobs that developed the administrative skills tested for by the exam. Accordingly, reliance on the administrative skills was improper. See Wilmore v. City of Wilmington, 699 F.2d 667, 675 (3d Cir. 1983).

None of the Fourth Circuit decisions commonly cited in this area seems to have dealt specifically with the objective/subjective distinction. For instance, in EEOC v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), the court flatly stated that disparate impact analysis could be applied only to objective practices. In

### III.

#### APPLICATION TO THIS CASE

##### A. Separate Hiring Channels and Word-of-Mouth Recruitment

The first practice the plaintiffs challenge is the use of separate hiring

that case, however, the plaintiffs apparently identified no specific practice; instead, they seem to have been challenging the entire employment process. I would reach the same result, refusing to apply disparate impact unless the plaintiffs can identify a specific practice that causes a disparate impact. Similarly, Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982), was a disparate treatment case; the plaintiffs alleged discrimination in general, not that it was implemented through some specific practice. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972), failed to distinguish between the impact and treatment analysis at all. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed pursuant to Sup.Ct.R. 60, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), is actually precedent for application of disparate impact analysis to more subjective systems, despite the flat statement in EEOC. In Robinson, the Fourth Circuit applied disparate impact to use of a seniority system that was at least partially subjective.

The decisions in the Fifth Circuit display a similar lack of resolution in



channels and word-of-mouth recruitment for cannery workers and for the skilled at-issue jobs. The use of separate hiring channels can insulate an employer's

drawing a line between objective and subjective practices. Several panels of that circuit have thought that the law of the circuit precluded application of the disparate impact analysis to subjective factors, relying on Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982). See Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1201-02 (5th Cir.), cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188-89 (5th Cir. 1983) (Wisdom, J.); Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 764 (5th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983). But at least one recent Fifth Circuit panel noted Pouncy and went on to apply disparate impact analysis to a system that based promotions on the subjective evaluations of foremen. See Page v. United States Indus., 726 F.2d 1038, 1045-46 (5th Cir. 1984). The clarity of the ostensible rule of Pouncy is also not evident from that opinion itself. In fact, the opinion had alternative holdings: first, that the plaintiffs had not established that the practices caused the impact; and, second, that the practice was not susceptible to the disparate impact analysis because of its subjectivity. 668 F.2d at 800-01. I also note that in none of the Fifth Circuit cases following Pouncy would plaintiffs

decisionmaking process from any need to consider the qualifications of unwanted minorities. Accordingly, disparate

clearly have prevailed under my disparate impact analysis anyway. See Vuyanich, 723 F.2d at 1201-02 (plaintiff apparently failed to identify a specific practice); Carroll, 708 F.2d at 188-90 (apparently the plaintiffs failed to show causation); Pegues, 699 F.2d at 764-65 (practice not by an employer, but by a state employee commission).

In the Sixth Circuit, disparate impact analysis has been applied in cases challenging rehiring based on unguided opinions of foremen. See Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982) (per curiam).

The Seventh Circuit, in a case strikingly similar to this one, applied disparate impact analysis, as I do here, to word-of-mouth recruitment and selection of hiring channels. See Clark v. Chrysler Corp., 673 F.2d 921, 927 (7th Cir.), cert. denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982).

In the Eighth Circuit, I do find cases that are not reconcilable with my approach. That circuit has maintained a firm refusal to apply disparate impact analysis to what it characterizes as "subjective" practices. See, e.g., Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983) (applying treatment analysis to a system relying on individual discretion), cert. denied, 466 U.S. 972 (1984); Talley v. United States Postal Serv., 720 F.2d 505, 506-07 (8th Cir. 1983) (refusing to apply impact analysis), cert. denied, 466 U.S. 952,

impact analysis of this claim is appropriate.<sup>5</sup>

But this does not mean that Atonio's claim must prevail. As part of his prima

104 S.Ct. 2155, 80 L.Ed.2d 541 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (per curiam) (same). For the reasons articulated in the text, I think these cases are incorrect. I note that this footnote demonstrates that my approach is consistent with the great majority of existing authority.

The Tenth Circuit has uniformly applied disparate impact analysis to practices that use subjectivity to cloak discrimination. See, e.g., Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1245 (10th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); Coe v. Yellow Freight Sys., 646 F.2d 444, 450-51 (10th Cir. 1981) (dicta); Williams v. Colorado Springs, Colo. School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981).

I have already noted the inconsistency of one recent Eleventh Circuit decision with my opinion. See Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (applying disparate impact analysis to the end result of a hiring process without requiring the plaintiffs to identify a particular practice). That disagreement as to the requirements of the prima facie case does not extend, however, to the scope of the impact analysis itself. I would apply impact analysis to the facts of Griffin, only reaching a different result.

facie case, he must establish causation. In turn, that element requires proof that a substantial number of the class possess the qualifications legitimately required

Finally, the D.C. Circuit has recently articulated a complicated position, not completely in accord with either of the common positions exhibited in the other circuits. See Segar v. Smith, 738 F.2d 1249, 1270-72 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). In that opinion, the panel discussed the following scenario. After a plaintiff establishes a prima facie treatment case, defendants frequently advance an employment practice as a legitimate reason for their hiring decisions. According to the Segar panel, the employers' articulation of that practice as a defense to the treatment case establishes a prima facie impact case against the practice in question. Accordingly, the defendants must defend the practice under the business necessity test required by disparate impact analysis.

5. I recognize that this claim is quite similar to the claim presented in Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), a claim to which the Court refused to apply disparate impact analysis, id. at 575 & n. 7, 98 S.Ct. at 2948-49 & n. 7. In that case, the Court emphasized the "importance of selecting people whose capability has been demonstrated to defendant." Id. at 574, 98 S.Ct. at 2948



for the skilled jobs. The district court did not make any findings on this point. Because the record is unclear, I would remand for further factfinding on this point. See Icicle Seafoods, Inc. v. Worthington, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986). For each job that the district court finds a substantial number of qualified plaintiffs, the district court must evaluate the business necessity of separate hiring channels.

B. Nepotism

The second hiring practice the employees challenge is nepotism. The

(quoting the lower court opinion). If this were treated as a job qualification, under my analysis the impact analysis would apply, but the plaintiffs would have failed to establish a prima facie case because they were not qualified. Most importantly, however, the Furnco footnote is just not specific enough to resolve the question before us. I do not think it is useful to search at length for an explanation for the Furnco result the Court declined to give us.

district court subjected this claim to impact analysis pursuant to our decision in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303-04 (9th Cir. 1983), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984). It rejected the claim, finding that the individuals were hired because of their abilities rather than their relation to the employers. Excerpt of Record (E.R.) at 324-25. I might construe this as a finding that the canneries had no practice of nepotism, apart from their admitted practice of word-of-mouth recruitment. If this were so, the plaintiffs' challenge would fail. Because the appropriate legal standard was less than clear at the time the district court considered this case, I would remand this claim back to that court for further consideration.



C. Rehire Policies

The third practice the employees challenge is the rehire policies of the employers. Like the practices discussed above, rehire policies insulate the employer from the need to consider the applications of possibly qualified minorities. The district court properly applied disparate impact analysis to this practice, but rejected the employees' challenge because it found the practice was justified by business necessity, viz. the short season and the dangers of the industry. E.R. at 334. Because this finding is not clearly erroneous, I would affirm the district court's disposition of this claim without addressing other aspects of it.

D. Lack of Objective Employment Criteria

Next, the employees challenge the employers' lack of objective employment criteria. The district court found as a

fact that the employers did have objective criteria. The defendants' pretrial order listed a number of qualifications assertedly necessary for the jobs in question. After hearing evidence, the court explicitly found that these qualifications were "reasonably required for successful performance." E.R. at 299. Although some evidence in the record suggests that these qualifications were not applied evenhandedly, discrimination in application raises a treatment claim. It is only the choice of qualifications that is subject to disparate impact analysis. I cannot say that the district court's decision was clearly erroneous. Accordingly, I would affirm its disposition of this claim.

E. Housing and Messing Practices

Finally, the employees allege racial discrimination in the canneries' housing

and messing practices. I do not think this claim is properly susceptible to disparate impact analysis. In no way do these practices enable an employer to reject prospective minority employees without considering their qualifications. The only Title VII challenge to these practices can be under the disparate treatment theory. The district court's rejection of the claim on that theory, E.R. at 336-37, was not clearly erroneous. Accordingly, I would affirm the district court's treatment of this claim.

In summary, I would affirm the district court's dismissal of the plaintiffs' claims regarding rehire policies, subjective employment criteria, and racial discrimination in housing and messing practices. I would reverse the district court's dismissal of the separate hiring channels and nepotism

claims and would remand for further factfinding.

Frank ATONIO, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Feb. 18, 1986.

En Banc Opinion Feb. 23, 1987.

Decided Sept. 2, 1987.

Abraham A. Arditi, Seattle, Wash.,  
for plaintiffs-appellants.

Douglas M. Fryer, Douglas M. Duncan,  
Seattle, Wash., for defendants-appellees.

Bill Lann Lee, Los Angeles, Cal.,  
and Robert Williams, Washington, D.C.,  
for amicus curiae.



Appeal from the United States District Court for the Western District of Washington.

Before CHOY, ANDERSON, and TANG, Circuit Judges.

TANG, Circuit Judge:

I.

Former salmon cannery workers sued their employers for discrimination on the basis of race, advancing both disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court declined to apply disparate impact analysis to certain subjective employment practices and this panel affirmed that decision. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1132 & n. 6 (9th Cir. 1985), withdrawn, 787 F.2d 462 (9th Cir. 1985). An en banc panel decided that "disparate

impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class." Atonio, 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). The en banc panel returned the cause to this panel to reconsider the district court's disposition of the plaintiffs' claims. Id. at 1486.

In our prior decisions we have presented the factual background of this case in considerable detail, and we will not repeat it here. See Atonio, 768 F.2d at 1122-24. We have also explained the legal principles governing analysis of Title VII disparate treatment claims. Id. at 1124-31. The en banc panel adopted the rule that disparate impact analysis may be applied to the "subjective" employment practices

challenged in this case, but it did not explain in any detail how the analysis should be applied. See Atonio (en banc), 810 F.2d at 1482. We now provide that explanation, in light of the reasoning and rationale of the en banc panel in adopting impact analysis.

#### DISPARATE IMPACT ANALYSIS

[1-3] A class claim of disparate impact is essentially an allegation that a disparity in the position of nonwhites and whites, often proved through statistical evidence, is "the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business." Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). The quantity and quality of statistical evidence which will give rise to an inference that the disparity is caused by

the employer's practices is the same as that which will give rise to an inference of discriminatory intent. Id.

The crucial difference between a disparate treatment and a disparate impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). The Supreme Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), that the burden of persuasion

always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." Id. 450 U.S. at 252 n. 5, 101 S.Ct. at 1093 n. 5.

Precisely what the employer must prove will vary with the unique factors of different job settings, but "[t]he touchstone is business necessity." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Business necessity of employee selection criteria may be shown by demonstrating that the selection criteria applied are essential to job safety or efficiency, Dothard v. Rawlinson, 433

U.S. 321, 331 n. 14, 97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977), or correlated with success on the job. Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982). In short, the employer must demonstrate the "manifest relationship" between the challenged practice and job performance. Griggs, 401 U.S. at 432, 91 S.Ct. at 854. Job relatedness is thus the means of proving "business necessity" when the purpose of a criterion is to predict the capacity of particular individuals to perform a job successfully.

When other employment practices are challenged, whose purpose is not to predict successful job performance, business necessity turns on proof of the burden or benefit to the business of the practice under scrutiny. See Schlei and



Grossman, Employment Discrimination Law, 1329 (2d ed. 1983). Business necessity means more than a business purpose. Business necessity requires that a practice "must substantially promote the proficient operation of the business." Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981). See also, Williams v. Colorado Springs School District No. 11, 641 F.2d 835, 842 (10th Cir. 1981) ("The practice must be essential, the purpose compelling."). Accord Crawford v. Western Electric Co., Inc., 745 F.2d 1373 (11th Cir. 1984); Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n. 6 (8th Cir. 1980); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), cert. denied, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Robinson v. Lorillard Corp.,

444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971)

After the employer proves the business necessity of his practices, the plaintiff class has the opportunity to demonstrate that other employment practices or selection devices could serve the employer's needs with a lesser impact on the protected class. Moody, 422 U.S. at 425, 95 S.Ct. at 2375; Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983); Chrisner, 645 F.2d at 1263. Whether the plaintiffs' proposed alternative rebuts, or should prevail over, the employer's proof of the business necessity of the original practice is then the ultimate determination to be made.

## APPLICATION OF IMPACT

### ANALYSIS

#### A. Standard of Review

The ultimate finding of no discriminatory intent in a Title VII action is a factual finding that may be overturned on appeal only if it is clearly erroneous. Fed.R.Civ.P. 52(a); Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); Pullman Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1401 (9th Cir. 1986). See also Kimbrough v. Secretary of the United States Air Force, 764 F.2d 1279, 1281 (9th Cir. 1985) ("After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determination."). Under the clearly erroneous test, this court must

affirm the district court's determination unless "left with the definite and firm conviction that a mistake has been committed." Gibbs, 785 F.2d at 1401 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). The "'district court must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes." Casillas v. United States Navy, 735 F.2d 338, 342-343 (9th Cir. 1984) (quoting United States Postal Service Bd. v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)).

Of course, we review legal questions de novo. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc),

cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The conclusion a district court reaches about whether a Title VII plaintiff has satisfied the elements of a prima facie case is reviewed de novo. See, e.g., Clady v. Los Angeles County, 770 F.2d 1421, 1427 (9th Cir. 1985), cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986); Thorne v. City of El Segundo, 726 F.2d 459, 464 n. 5 (9th Cir. 1983), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984), appeal after remand, 802 F.2d 1131 (9th Cir. 1986); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 540-45 & n. 13 (9th Cir. 1982). We have also suggested, without deciding the question, that the appropriate standard for reviewing the lower court's conclusion at the third stage of a discriminatory treatment case--proving that an employer's proffered explanation

for differential treatment is mere pretext--is also subject to de novo review. Thorne, 726 F.2d at 465 & n. 6.

#### B. The Class Claims

As the en banc panel emphasized, a class action pattern and practice case is amenable to both treatment and impact analysis. Atonio, 810 F.2d at 1480. In reviewing the district court's resolution of the class claims, our organizational principle is the practices complained of, rather than the mode of proof. But first we discuss the district court's treatment of the statistical evidence offered by both parties.

##### 1. Statistics

[4, 5] Statistical evidence is of critical value in creating an inference of either discriminatory intent or impact. We have recognized the importance of statistics as circumstantial evidence of discriminatory



intent, but have cautioned that the weight given to them depends on "proper supportive facts and the absence of variables." Spaulding v. University of Washington, 740 F.2d 686, 703 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984), overruled on other grounds, Atonio, 810 F.2d 1477 (en banc). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous standard of review. Gay, 694 F.2d at 550; see also Allen v. Prince George's County, Md., 737 F.2d 1299, 1303 (4th Cir. 1984).

The plaintiffs introduced comparative statistics showing the disproportionate concentration of nonwhite persons in the lower paying jobs. In analyzing the evidence of

disparate treatment, the district court began its inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: unskilled and skilled.

Taking each group in turn, the court first found that the unskilled jobs were fungible, and, thus, comparative statistics were appropriate for use in establishing a prima facie case of discrimination. Since the comparative statistics showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had established a prima facie case with respect to the unskilled jobs.

In considering the skilled positions, the district court had more difficulty in finding a prima facie case of intentional discrimination, because it did not consider plaintiffs' statistical evidence probative. The court concluded that the practice of hiring through

Local 37 had tended to distort the racial composition of the work force. Thus, when considering the skilled positions, the court found that statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race. Although we accept this finding, we stress that such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established. Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir.) (per curiam), modified, 742 F.2d 520 (9th Cir. 1984).

The cannery workers contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. The

district court accorded these statistics, comparing the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or those available for preseason work. This was error because when job qualifications are themselves at issue, the burden is on the employer to prove that there are no qualified minority people for the at-issue jobs. Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1358 n. 1 (9th Cir. 1975); Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982). Furthermore, it is unrealistic to expect statistics to be calibrated to reflect preseason availability when the preseason starts only one month earlier than the season.

The comparative statistics offered by the cannery workers are sufficient to

support an inference of discrimination in hiring practices both as to unskilled and skilled jobs. While the district court discounted the comparative statistics in evaluating the claim of intentional discrimination in skilled jobs we find them sufficiently probative of adverse impact. The statistics show only racial stratification by job category. This is sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs. As the court stated in Domingo, comparative statistics demonstrate "the consequences of . . . discriminatory hiring practices." 727 F.2d at 1436.

Thus, in this case, because the comparative statistics support an

inference of discriminatory impact, and because the cannery workers have identified certain practices which cause that impact, it is incumbent on the district court to evaluate the business necessity of the practices. Of course, it is also essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact.

## **2. Employment Practices**

### **a. Nepotism**

[6] The cannery workers contend that the district court erred in not giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of whites and particularly (sic) nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired



and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more than nonwhites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.

The district court subjected the cannery workers' nepotism allegations to impact analysis, in accordance with Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984). We think the district court may have missed the point of Bonilla in evaluating nepotism at these canneries.

If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites. Id. at 1303. The evidence shows that of 349 nepotistic hires in four upper-level departments during 1970-75, 332 were of whites, 17 of nonwhites. That the court found individuals were hired for their skills and not because they were relatives serves to dispel the inference of discriminatory intent but it does not meet the defendants' burden in refuting a claim of disparate impact. What is required is that the defendants prove the business necessity of the nepotism policy. Id.; Contreras, 656 F.2d at 1275-80. As we said in Bonilla, generally "nepotistic concerns cannot supersede the

nation's paramount goal of equal opportunity for all." 697 F.2d at 1303.

**b. Subjective Criteria**

[7] A crucial aspect of the cannery workers' treatment claim was the alleged absence of job criteria and the latitude it allowed for subjective decision making. Courts recognize that subjective criteria are ready mechanisms for discrimination. See, e.g., EEOC v. Inland Marine Industries, 729 F.2d 1229, 1236 (9th Cir.), cert. denied, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984); Domingo, 727 F.2d at 1436 n. 3. In evaluating a claim of disparate treatment, subjective criteria are suspect because they may mask the influence of impermissible racial bias in making hiring decisions. The district court considered the claim that there were no objective job criteria but found that there were in fact objective

criteria. It adopted verbatim from the defendants' pretrial order a list of qualifications which it found "reasonably required for successful performance" of a number of jobs. Opinion at 34. It did not, however, find that these specific criteria were actually applied by those who made hiring decisions, and at one point noted the "general lack of objective job qualifications." Opinion at 60. The court said people were evaluated according to job-related criteria, but in context that statement apparently meant only that the general criteria of experience and skills were considered but subjectively evaluated by hiring officials. Thus the lists merely supported the conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. The court also found that the necessary

skills are not readily acquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court found that preseason availability is a necessary qualification for many of the positions, but that it is never a requirement for cannery worker jobs. While these findings are not clearly erroneous, and may serve to defeat the inference of discriminatory animus, they do not support a finding that there was no disparate impact occasioned by this practice.

The cannery workers allege that the lack of objective job qualifications and the consequent hiring on the basis of subjective evaluations has an adverse impact on nonwhites in the canning industry. The companies concede the causal relation between their hiring

criteria and the number of nonwhites in the at-issue jobs, but argue that there are objective qualifications which differentiate among potential employees in such a way that there are no qualified nonwhites for the at-issue jobs. The district court, as discussed, found there were qualifications for the jobs, including specific skills and experience. We think the court must analyze whether these qualifications were actually applied in a non-discriminatory manner. The Supreme Court has held that only "non-discriminatory standards actually applied" by employers are pertinent in a discrimination case." Franks v. Bowman Transportation Co., 424 U.S. 747, 773 n. 32, 96 S.Ct. 1251, 1268 n. 32, 47 L.Ed.2d 444 (1976) (emphasis in original). There is anecdotal evidence which suggests that these criteria were not applied. For example, the district



court found that reasonable qualifications for a dry tender engineer included "one year of related boat experience or six months engine mechanical experience and one season of tender experience." But one dry tender engineer, who was a relative of a company home office employee, had had no mechanical experience or training other than performing preventive maintenance on his car, and no experience working on a boat.

More importantly, the court must bear in mind that where qualifications are at issue, the burden is on the employer to prove the lack of qualified people in the nonwhite group. Kaplan, 525 F.2d at 1358 n. 1. As we said in Wang, 694 F.2d at 1148, "[h]e cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of

the system is first established." Finally, and most importantly, the court must make findings as to the job-relatedness of the criteria actually applied.

**c. Separate Hiring Channels and Word-of-Mouth Recruitment**

[8] The cannery workers urge reversal on the ground that the district court's findings failed to address the discriminatory nature of separate hiring channels and word-of-mouth recruitment. We are troubled by this omission. There is, however, sufficient indication that the court considered the practices and apparently found them explained by the companies' professed concerns with honoring their commitments to various unions and finding appropriately skilled workers. See Nicholson v. Board of Education, 682 F.2d 858, 866 (9th Cir. 1982).

The cannery workers argue that word-of-mouth recruitment and recruitment for skilled jobs in different channels from those used to fill unskilled jobs are a significant cause of the disparity in the jobs held by whites and nonwhites. Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious. See Domingo, 727 F.2d at 1435-36. This court has long recognized the contribution of separate hiring channels to proving the disparate impact of a pattern or practice

of discrimination. In United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), which involved both treatment and impact claims, we held that the "active recruitment of whites, while at the same time giving little or no publicity to information concerning procedures for gaining union membership, work referral opportunities, and the operation of the apprenticeship programs in the black community," was probative of a pattern or practice of discrimination against blacks in the construction industry. Other courts, too, have long recognized that word-of-mouth recruiting is "discriminatory because of its tendency to perpetuate the all-white composition of a work force." Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975).

The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. The companies say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the Native villages. However, in considering the claims of the twenty-two individuals who alleged they had been discriminated against, the district court did not find they lacked qualifications, but rather that they did not make timely applications. Thus, there is evidence that some of the people counted in the comparative statistics may be qualified for skilled jobs, and it is not disputed they could fill the at-issue unskilled jobs.

We also point out that logic simply does not support the inference, in a time of widespread unemployment and

underemployment, that persons who hold, or are willing to take unskilled jobs, lack the skills for other, more demanding and higher paying jobs. The burden must shift to the companies to prove the business necessity of this practice. The district court observed that it is not a reasonable business practice to seek skilled workers in remote, sparsely populated regions. We cannot agree without a more specific development of the facts and rationale that would explain why it would be unreasonable to notify all potential employees of all the job openings available.

We also agree with the plaintiffs that the district court may have erred in crediting the companies' claims that the people in the channels from which it recruited for unskilled jobs were unavailable for preseason work and thus did not meet one of the requirements for



many of the at-issue jobs. Residents of Alaska villages would logically be available for the preseason and the evidence simply does not support the broad conclusion that members of Local 37 were unavailable. The preseason begins in May and the season's work begins in June and broad statistics do not tell us enough about the availability of otherwise qualified individuals.

#### **d. Rehire Preferences**

[9] The salmon canneries give rehire preference to past employees in their old jobs. When jobs are racially stratified, giving rehire preference to former employees tends to perpetuate the existing stratification. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). It is not clear whether the district court considered whether this practice derived

from an intent to discriminate. When it addressed the obvious disparate impact of the practice it held that rehires were justified by business necessity. The court found that the short season and dangers of the industry justified the rehire practice. This finding is supported by the evidence.

#### **3. Race Labeling, Housing and Messing**

[10-12] Race labeling is pervasive at the salmon canneries, where "Filipinos" work with the "Iron Chink" before retiring to their "Flip bunkhouse." The district court did not find the conduct laudatory but found that it was not "persuasive evidence of discriminatory intent." Perhaps not, but the court must carry the analysis further and consider whether such a practice has any adverse impact upon minority people, i.e., whether it operates as a headwind to minority advancement.

The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The plaintiff class claimed that nonwhites, particularly Filipinos, were segregated from whites and placed in inferior bunkhouses because of racial discrimination. The district court found that the cannery workers established a prima facie case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the class failed to prove pretextual. Specifically, the court found that the employees were housed by their time of arrival and by crew rather than with an intent to discriminate. The record contains sufficient evidence to support the district court's conclusion that the companies articulated a nondiscriminatory reason for their practice.

Cannery workers were also fed separately from the remainder of the work force. They alleged that this was due to racial discrimination. The district court agreed that they had established a prima facie case of intentional discrimination, but that the defendants had met their burden of production and the cannery workers had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed a "traditional" oriental menu. The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which

the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these findings, and we cannot find them clearly erroneous.

The district court also evaluated the complaints of segregated housing and messing under the impact theory and found that business necessity justified these practices. See Wambheim v. J.C. Penney, 705 F.2d 1492 (9th Cir. 1983) (impact analysis applies in employment benefits cases), cert. denied, 467 U.S. 1255, 104 S.Ct. 3544, 82 L.Ed.2d 848 (1984). The impact is clear in this case. The segregated housing aggravated the isolation of the non-white workers from the "web of information" spread by word-of-mouth among white people about the

better paying jobs. See Domingo, 445 F.Supp. 421, 435 (W.D. Wash. 1977), aff'd, 727 F.2d 1429 (9th Cir.), modified, 742 F.2d 520 (9th Cir. 1984). But the district court found the companies could not be required to winterize all of their housing when bunkhouse assignment by date of availability renders such an expenditure unnecessary. We hold that such a rationalization is not sufficient, without more, to sustain a finding of business necessity. Efforts to economize may be viewed as a business necessity only if the companies substantiate that these measures are clearly necessary to promote the proficient operation of the business. See Chrisner, 645 F.2d at 1262. Even if economizing is seen as a business necessity, the plaintiffs must have the opportunity to show that it could be accomplished with a lesser impact upon



the nonwhite people in the cannery work force.

The court found the separate mess facilities mandated by the employer-union agreements with Local 37. Since it also correctly noted that an agreement with a union will not immunize an employer from discrimination claims, Williams v. Owens-Illinois, Inc., 665 F.2d 918, 926 (9th Cir.), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982), we are unsure what its conclusion was as to the discriminatory impact of separate messing.

In assessing how racial labeling and segregated housing and messing facilities may cause an adverse impact we suggest that the court consider the message that such practice conveys to the general population. As the Supreme Court has warned:

The ["whites only"] message can be communicated to potential

applicants more subtly but just as clearly by an employer's actual practices--by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Teamsters, 431 U.S. at 365, 97 S.Ct. at 1870.

#### C. Individual Claims

[13] Twenty two plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. The district court correctly noted that a plaintiff seeking relief under 42 U.S.C. § 1981 must show intentional discrimination and then analyzed the

§ 1981 and the Title VII treatment claims under the McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The court found the individuals had failed to establish a prima facie case because they could not show they had applied for existing job openings and thus no inference of discriminatory intent arose. They had made oral inquiries, which were not considered applications, or their applications were untimely. Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquiries were not considered an application unless followed up by a written application to the home office during the winter. Conversely, because the companies

generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nonwhites differently in these respects. The court also found that some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. While there is evidence in the record to support the district court's findings regarding these individual claims, the findings are premature in light of the decision that the practices of these employers must be evaluated for disparate impact.

The cannery workers argue persuasively that the companies' use of separate hiring channels and word-of-mouth recruitment, and their failure to announce vacancies should serve to excuse

the cannery workers from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications. See O'Brien v. Sky Chefs, 670 F.2d 864, 868 (9th Cir. 1982), overruled on other grounds, Atonio, 810 F.2d 1477 (en banc). The cannery workers' argument derives from a discussion of damages issues in Domingo, 727 F.2d at 1445. In Domingo we said it would be an unrealistic burden on claimants to prove timely applications when application procedures were informal and word-of-mouth recruitment made it difficult for present or prospective employees to become aware of openings when they occurred. Id. For the same reasons, if the district court in this case finds that the challenged practices violate Title VII under the impact analysis, it must then conduct additional proceedings

to determine appropriate individual relief, even though individuals have not persuaded the court of their disparate treatment. See Teamsters, 431 U.S. at 361, 97 S.Ct. at 1867; Franks, 424 U.S. at 773 n. 32, 96 S.Ct. at 1268 n. 32.

#### **D. The Motion for Attorney's Fees**

We decline to entertain any motion for attorney's fees at this point in this litigation. There are issues of fact and law remaining for determination. We leave to the district court to determine, upon proper motions, properly supported, whether and to what extent any party is a prevailing party for the purposes of an award of attorney's fees. See Hensley v. Echerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). If any fee award is made it shall include appropriate consideration of fees for this appeal and all proceedings in the district court.



The judgment is VACATED and the cause is REMANDED for further proceedings consistent with this opinion.

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

FRANK ATONIO, EUGENE BACLIG,  
RANDY del FIERRO, CLARKE KIDO,  
LESTER KURAMOTO, ALAN LEW, CURTIS  
LEW, ROBERT MORRIS, JOAQUIN ARRUIZA,  
BARBARA VIERNES, as administratrix  
of the Estate of Gene Allen Viernes,  
and all others similarly situated,

Plaintiffs-Appellants,

vs.

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC., and  
COLUMBIA WARDS FISHERIES,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON AT SEATTLE

---

PETITION FOR REHEARING (FRAP 40)

---

DOUGLAS M. FRYER,  
DOUGLAS M. DUNCAN,  
RICHARD L. PHILLIPS,  
of Mikkeltorg, Broz,  
Wells, Fryer & Yates  
Attorneys for Appellees

Office and Post Office Address:  
Suite 3300, 1001 Fourth Avenue Plaza  
Seattle, WA 98154  
Telephone: (206) 623-5890

---

I.

INTRODUCTION

In counsel's judgment, the court's opinion filed on September 2, 1987 overlooked a material point of fact dealing with a principal contention of defendants.

II.

ARGUMENT

The opinion of the court states, in pertinent part (slip op. at 14):

The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. The companies say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the native villages.

The opinion also states (slip op. at 12) that the defendants argue that there are no qualified nonwhites for the at-issue jobs.

Defendants, on the contrary, do dispute that their practices have disparate impact. See defendants' opening brief (Brief of Appellees), pp. 8-13, 25-26, 28-29, 34-35, and 45-46; Supplemental Brief of Appellees, pp. 1, 3, 4, and 5.

Nor do defendants argue that there are no people qualified for skilled jobs in the relevant labor supply, the cannery workers union, or in the remote areas of Alaska. Those sources of employees are but one slice of the overall labor supply that is approximately 10% minority. District Court op. at 20, Finding of Fact 107; Brief of Appellees, p. 8. Defendants did hire qualified minorities in every job classification. Finding of Fact 123.

It is central to defendants' position that plaintiffs did not show disparate impact. The panel opinion

apparently overlooked this argument. I is requested that the court permit reargument on the application of the disparate impact analysis on the facts of this case.

DATED September 16, 1987.

---

DOUGLAS M. FRYER,

---

DOUGLAS M. DUNCAN,

---

RICHARD L. PHILLIPS,

of Mikkelsen, Broz, Wells,  
Fryer & Yates,  
Attorneys for Appellees.



CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on September 16, 1987, I served the foregoing Petition for Rehearing, by causing two copies thereof to be mailed, postage prepaid, to counsel for plaintiffs-appellants, as follows:

Abraham A. Arditi, Esq.  
Northwest Labor and Employment Law Office  
900 Hoge Building  
705 Second Avenue  
Seattle, Washington 98104

DOUGLAS M. DUNCAN,

APPENDIX VIII

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANK ATONIO,	)	
EUGENE BACLIG,	)	
RANDY del FIERRO,	)	
CLARKE KIDO, LESTER	)	
KURAMOTO, ALAN LEW,	)	Nos. 83-4263
CURTIS LEW, ROBERT	)	84-3527
MORRIS, JOAQUIN	)	
ARRUIZA, BARBARA	)	
VIERNES, as admin-	)	D.C. No.
istratrix of the	)	CV 74-145 JLQ
estate of Gene	)	
Allen Viernes, and	)	
all others	)	
similarly situated,	)	
	)	<u>ORDER CLARIFYING</u>
Plaintiffs-,	)	<u>OPINION</u>
Appellants,	)	

vs.

WARDS COVE PACKING  
COMPANY, INC.,  
CASTLE & COOKE,  
INC., and COLUMBIA  
WARDS FISHERIES,

Defendants-  
Appellees.

Before: CHOY, ANDERSON, and TANG,  
Circuit Judges.

Disparate impact claims against joint venturers Wards Cove Packing Co. and Castle & Cooke, Inc. were extinguished by the failure to ever file discrimination charges against Wards Cove or Castle in their capacity as joint venturers and by the failure to file a timely EEOC charge against the joint venture, Columbia Wards Fisheries. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1124-25 (9th Cir.), withdrawn on other grounds, 787 F.2d 462 (9th Cir. 1985).

Filed by Cathy A. Catterson, Clerk of United States Court of Appeals Ninth Circuit on November 12, 1987.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANK ATONIO,	)	
EUGENE BACLIG,	)	
RANDY del FIERRO,	)	
CLARKE KIDO, LESTER	)	
KURAMOTO, ALAN LEW,	)	Nos. 83-4263
CURTIS LEW, ROBERT	)	84-3527
MORRIS, JOAQUIN	)	
ARRUIZA, BARBARA	)	
VIERNES, as admin-	)	D.C. No.
istratrix of the	)	CV 74-145 JLQ
estate of Gene	)	
Allen Viernes, and	)	
all others	)	
similarly situated,	)	
	)	
Plaintiffs-,	)	<u>ORDER DENYING</u>
Appellants,	)	<u>PETITION FOR</u>
	)	<u>REHEARING</u>
	)	
vs.	)	
	)	
WARDS COVE PACKING	)	
COMPANY, INC.,	)	
CASTLE & COOKE,	)	
INC., and COLUMBIA	)	
WARDS FISHERIES,	)	
	)	
Defendants-	)	
Appellees.	)	
	)	

Before: CHOY, ANDERSON, and TANG,  
Circuit Judges.

The panel has considered the  
Petition for Rehearing. The Petition for  
Rehearing is denied.

Filed by Cathy A. Catterson, Clerk of  
United States Court of Appeals Ninth  
Circuit on November 12, 1987.



**IN THE SUPREME COURT  
of the  
UNITED STATES**

**October Term, 1987**

**WARDS COVE PACKING COMPANY, INC. and  
CASTLE, & COOKE, INC.**

*Petitioners,*

*vs.*

**FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO,  
CLARKE KIDO, LESTER KURAMOTO, ALAN LEW,  
CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA,  
BARBARA VIERNES, as administratrix of the estate of  
Gene Allen Viernes, and all others similarly situated,**

*Respondents.*

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Abraham A. Arditi**  
Northwest Labor and Employment Law Office  
900 Hoge Building  
Seattle, Washington 98104  
1-206-623-1590  
*Counsel of Record for Respondents*

**Bobbe Jean Bridge**  
Garvey, Schubert & Barer  
Waterfront Place Building  
1011 Western Avenue  
Seattle, WA 98104  
1-206-464-3939  
*Counsel for Respondents*

## TABLE OF CONTENTS

Statutes.....	1
Statement of the Case.....	1
Summary of Argument.....	4
Reasons for Denying Writ.....	5
Conclusion .....	14

## TABLE OF AUTHORITY

### Table of Cases

<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	5-6, 8, 9
<i>Domingo v. New England Fish Co.</i> , 727 F.2d 1479 (9th Cir. 1984), modified 742 F.2d 520 (1984) .....	7, 11
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977).....	9, 12
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) .....	10, 12
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	6, 12
<i>Hazelwood School District v. United States</i> , 433 U.S. 299 (1977).....	8
<i>Satty v. Nashville Gas Co.</i> , 434 U.S. 136 (1977) .....	5
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	6, 7
<i>Watson v. Fort Worth Bank and Trust</i> , ___ U.S. ___ (1986) (No. 86-6139) .....	13

### Statutes

42 U.S.C. § 2000e-2(a) .....	1, 5
42 U.S.C. § 2000e-2(h) .....	6

## STATUTES

This case involves 42 U.S.C. § 2000e-2(a), which appears in the Appendix to the petition for certiorari filed by the employees.

### STATEMENT OF THE CASE

This class action challenges a pattern of racial segregation in jobs, housing and messing at several Alaska salmon canneries. Two employers seek review of a decision by the court of appeals recognizing disparate impact claims under Title VII against them. The employees have also filed a petition for certiorari, but on other issues. For the Court's convenience, the employees reiterate a portion of the statement of the case from their petition here.

The Alaska salmon canning industry has been heavily non-white since the turn of the century. Because the canneries are generally located in remote areas, they hire migrant, seasonal workers, who live in company housing. The percentage of non-white employees in the industry was 40% to 70% during 1906-1978, stabilizing at about 47% to 50% toward the end of this period. (Appendix, p. A-250.<sup>1</sup>) The work force at the canneries here reflects industry-wide figures, for it has been about 43% non-white overall since 1970. (Ex. 583-87). But while the percentage of non-whites overall at the canneries is high, jobs are racially stratified. Non-whites are concentrated in the lowest paying jobs, while whites clearly dominate the higher paying jobs.

The degree of segregation varies somewhat, but the administrative, machinist, fisherman, tender, carpenter, beach gang, office and store departments are all white or heavily white. In contrast, the largest department—namely, cannery worker—is heavily non-white. At some canneries, the laborer department is also heavily non-white.

For example, at Bumble Bee cannery during 1971-80, seven departments—in which there were 342 new hires—were at least 90% white, although the cannery worker department

---

<sup>1</sup>Citations are to the appendix to the petition for certiorari filed by the employees rather than the employers.



was 52% non-white. (Exhibit A-278 SN, Table 4.) At Red Salmon cannery, four departments—in which there were 146 new hires—were at least 94% white, although the cannery worker department was 64% non-white. (Exhibit A-278 RS, Table 4.) At Wards Cove cannery, six departments—in which there were 228 new hires—were at least 93% white, although the cannery worker department was 31% non-white. (Exhibit A-278 WC, Table 4.) At Ekuk cannery, five departments—in which there were 111 new hires—were at least 90% white, although the cannery worker department was 67% non-white. (Exhibit A-278 EK, Table 4.) At Alitak cannery, seven departments—in which there were 299 new hires—were at least 62% white, while the cannery worker department was 65% non-white. (Exhibit A-278 AK, Table 4.)

The pattern of segregation is matched by express race labelling of jobs, bunkhouses and messhalls. Company records refer to "Filipino cannery workers," "Native cannery workers," the "Filipino union," "Philippine Bunkhouse," "Native Galley Cook" and "Filipino Mess." (Appendix, p. A-283-284.) A mail slot in the office at one cannery is marked "Oriental bunkhouse." (Appendix, A-285-286.) The president of one employer testified Alaska Native crews are race labelled "for mere ease or habit of identification." (RT 1143.) Employee badge numbers are assigned along racial lines. (Appendix, p. A-284-285.) Even the salmon butchering machine has a name with racial overtones, the "Iron Chink." (Appendix, p. A-37.) Far from being incidental, the "[r]ace labelling is pervasive at the salmon canneries." (Appendix, p. A-37.)

The pattern of job segregation is enforced by several practices.<sup>2</sup>

First, race labelling "operates as a headwind" to advancement of non-whites, because it conveys a "message" that they need not apply for upper level jobs. (See Appendix, p. A-37 and 43.)

Second, the employers use essentially segregated hiring channels for different jobs, which prevent non-whites from competing on the basis of qualifications with whites. The

<sup>2</sup>The employers say the employees challenged 16 practices which fostered job segregation, but only eight were treated by the court of appeals.

employers recruit from non-white sources such as Alaska Native villages, foremen of Asian descent and the heavily Filipino Local 37, ILWU, but only for the lowest paying jobs. (Appendix, p. A-31-32; Revised Pretrial Order, p. 14.)

Third, to fill higher-paying jobs, the employers rely on informal word-of-mouth recruitment among friends and relatives of white foremen and superintendents. (Appendix, p. A-32.) The employers neither publicize vacancies for upper-level jobs nor promote from non-white to white jobs, so the effect of segregated hiring channels is aggravated. (Appendix, p. A-241-242; Revised Pretrial Order, p. 16-19.)

Fourth, the employers do not use objective job qualifications for jobs at issue. They retained an expert who prepared qualifications for litigation, which the district court found could be "reasonably required." (Appendix, p. A-26.) But the expert testified the qualifications were never actually applied. (RT 3113; see also RT 3067.) The anecdotal evidence also indicates they were never actually applied. The use of subjective qualifications has a disparate impact on non-whites, which prevents them from competing on equal terms for upper-level jobs. (See Appendix, p. A-28-30.)

Fifth, there is pervasive nepotism at the canneries, which contributes to the racial segregation, since white supervisors control the upper level jobs. "[O]f 349 nepotistic hires in four upper-level jobs during 1970-75, 332 were of whites, 17 were of non-whites." (Appendix, p. A-24.)

Sixth, the employers give re-hire preference to employees in their old jobs, a practice which perpetuates the segregation by race in jobs. The court of appeals affirmed a finding the practice was justified by business necessity, although no evidence of business necessity was offered in the district court. (See Appendix, p. 36.)

Seventh, the employers maintain racially segregated bunkhouses, a practice which "aggravate[s] the isolation of the non-white workers from the 'web of information' spread by word of mouth among white people about the better paying jobs." (Appendix, p. A-41.)

Eighth, the segregated messhalls have a similar effect, again enforcing the pattern of job segregation. (Appendix, p. A-42-32.)

The employers justify the job segregation by arguing they hire too many non-whites in the lower paying jobs, rather than too few in the upper-level jobs. The centerpiece of their approach is a labor market comparison, which assumes non-white availability of only about 10%, even though non-whites comprise about 48% of employees in the industry. (RT 1870 *et seq.*) The job segregation is so graphic even the economist hired by the employers testified non-whites were absent from certain jobs at statistically significant levels. (RT 1871-73; *see also* RT 1875.) But overall, he testified there was no pattern or practice of discrimination, because recruiting through largely non-white sources for low paying jobs distorted the racial composition of the labor pool.

Following trial, the district court dismissed all claims. A panel of the court of appeals initially affirmed, but its opinion was withdrawn, when rehearing en banc was granted. Sitting en banc, the court of appeals held the disparate impact approach could be applied to the challenged practices. It then returned the appeal to the panel to apply this ruling.

The panel reversed dismissal of disparate impact challenges to nepotism, lack of objective qualifications, use of separate hiring channels, word of mouth recruitment, segregation in housing, segregation in messing and race labeling. Because it was not clear what—if any—job qualifications were actually applied, the court of appeals remanded for findings on this issue. It affirmed dismissal of a disparate impact challenge to use of certain re-hire preferences, because of a finding they were justified by business necessity.

### SUMMARY OF ARGUMENT

The Court should deny the writ, since virtually every issue raised by the employers has been foreclosed by controlling decisions of the Court. The departures the employers cite from decisions of the Court are based on a mis-reading of the opinions below.

## REASONS FOR DENYING THE WRIT

### 1.

#### The Ruling of the Court of Appeals on the Prima Facie Case is Consistent With Controlling Decision of this Court

The court of appeals correctly held that the job segregation statistics—as well as other evidence—established disparate impact, regardless of findings on the percentage of non-whites in the labor market area. Because this holding is consistent with controlling decisions of this Court, there is no reason to grant certiorari.

First, by its terms, Title VII makes segregation in jobs by race unlawful.

It shall be an unlawful employment practice for an employer—

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .

42 U.S.C. § 2000e-2(a)(2). (Emphasis added.) This Court has recognized claims of disparate impact under this section. *Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982); *Satty v. Nashville Gas Co.*, 434 U.S. 136, 144 (1977).

Second, because the disparate impact approach focuses on lost opportunities rather than simply lost jobs, labor market comparisons with those hired are irrelevant. This Court has already rejected the “bottom line” defense in disparate impact cases in *Connecticut v. Teal*, *supra*. Since a labor market argument is one form of a “bottom line” defense, *Teal* is controlling here.

In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to opportunities. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or



promoted. Thus *Dothard v. Rawlinson*, 433 U.S. 321 (1977), found that minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII. Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment. *Id.*, at 329-330 and n. 12. Similarly, in *Albermarle Paper Co. v. Moody*, *supra*, the action was remanded to allow the employer to attempt to show that the tests that he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden. See 422 U.S., at 436. See also *New York Transit Authority v. Beezer*, 440 U.S. 568, 584, (1979).

In short, the District Court's dismissal of respondent's claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of § 703(a)(2). The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the opportunity to compete equally with white workers on the basis of job related criteria.

*Connecticut v. Teal*, *supra* at p. 450-51. (Emphasis in original.)

Third, beginning with *Griggs*, this Court has endorsed disparate impact attacks on practices which foster job segregation. *Griggs* involved education and testing requirements, which operated as "built in headwinds" to transfers in a plant where "Negroes were employed only in the labor department," while "only Whites were employed" in the other four departments. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427, 432 (1971). Similarly, in *Teamsters v. United States*, 431 U.S. 324 (1977), this Court observed that a seniority system which enforced a pattern of job segregation would have been subject to a disparate impact challenge but for the exemption for seniority systems in 42 U.S.C. § 2000e-2(h).

The vice of this [seniority] arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers.

....

Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale.

*Teamsters v. United States*, *supra* at 344, 349.

Fourth, while the job segregation statistics illustrate the effect of the challenged practices, they are not the only evidence of disparate impact. Plaintiffs offered separate statistics on nepotism, which showed that fully 332 of 349 nepotistic hires in four upper-level departments during 1970-75 went to whites. (Appendix, p. A-24.) Similarly, the effect of segregated hiring channels is obvious, as the court of appeals pointed out.

[T]he companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious.

(Appendix, p. A-31-32.) See also *Domingo v. New England Fish Co.*, 727 F.2d 1479, 1435-36 (9th Cir. 1984), modified 742 F.2d 520 (1984). Beyond this, the employers conceded the effect of the practice in the court of appeals by arguing that the concentration of non-whites in lower level jobs results from recruiting in Alaska Native villages and through Local 37 for cannery worker jobs.<sup>1</sup> Similarly, the employers acknowledged in the court of appeals that the racial imbalance in jobs results from the inability of non-whites to meet the undisputedly subjective qualifications they impose.<sup>2</sup> But this is simply

<sup>1</sup>Brief of Appellees, p. 8 and 29.

<sup>2</sup>Brief of Appellees, p. 27-28.



another way of saying that the qualifications disqualify non-whites at a higher rate than whites, an observation which lies at the heart of a disparate impact violation.

Fifth, whether the employers fill the upper level jobs with new hires rather than promoting from within is irrelevant to the existence of disparate impact. A non-white who is condemned to a menial job because of an employer's recruitment practices is no less a victim of discrimination than a non-white who is denied a promotion once hired. Segregated hiring channels cut non-whites off from opportunities in the better jobs. Because the abilities of those recruited through different channels are not compared, non-whites are foreclosed from competing effectively on the basis of qualifications for upper-level jobs.

## 2.

### **The Court of Appeals Correctly Applied the Disparate Impact Approach in a Way Which is Consistent with Controlling Decisions of this Court**

Because the court of appeals applied the disparate impact approach in a way which is consistent with controlling decisions of this Court, certiorari is inappropriate.

#### a.

#### **The Court of Appeals Did Not Override the Findings of the District Court**

The employers argue that the court of appeals ignored the district court's findings on the labor market. But because a labor market defense is precisely the sort of "bottom line" argument this Court has rejected in disparate impact cases, the findings were irrelevant. (See page 5-6, *supra*.) *Connecticut v. Teal, supra*. Beyond this, statistics offered by the employers establish disparate impact, as is apparent from the job segregation figures—all of which are taken from defense exhibits—which are cited above. (See page 1-2, *supra*.) Even the economist who testified for the employers testified that there was statistically significant underrepresentation of non-whites in certain upper-level jobs. (See page 3, *supra*.) The employers argue *Hazelwood School District v. United States*, 433 U.S. 299 (1977), requires a labor market comparison. But

since it involves neither a disparate impact nor a job segregation claim, it is not pertinent here.

The employers also maintain the court of appeals ignored the district court's findings on nepotism. However, the district court found there was a "pervasive incidence of nepotism in the canneries." (Appendix, p. A-315.) Far from overturning this finding, the court of appeals simply corrected the district court's misunderstanding of the term "nepotism." (Appendix, p. A-23-24.) Since the only authority the employers cite is *Webster's*, this issue hardly merits a grant of certiorari.

#### b.

#### **The Court of Appeals Followed the Allocation of the Burden of Proof Set By Controlling Decisions of this Court**

The court of appeals held that the employees made a prima facie case of disparate impact by:

(1) show[ing] a significant disparate impact on a protected class, (2) identify[ing] specific employment practices or selection criteria and (3) show[ing] the casual relationship between the identified practices and the impact.

(Appendix, p. A-71, A-81, A-87-88.) These elements track precisely the guidelines this Court has set for a prima facie case on a disparate impact claim. *Connecticut v. Teal, supra* at 446 ("[t]o establish a prima facie case . . . a plaintiff must show that the facially neutral employment practice had a significant discriminatory impact"); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) ("to establish a prima facie case . . . a plaintiff need only show that the facially neutral standards select applicants for hire in a significantly discriminatory pattern"). Any claim that the court of appeals required a lesser showing is based on a misreading of its opinions.

#### c.

#### **The Court of Appeals Correctly Allocated the Burden of Proof on Qualifications Here**

The court of appeals correctly allocated the burden of proof on qualifications here. While the employers maintain the issue

is one of general importance, it in fact arises largely from circumstances peculiar to this case.

The employers argue that the employees bear the burden of offering statistics on the percentage of qualified non-whites. But this Court has held that only "non-discriminatory standards *actually applied*" by the employer are pertinent in a Title VII case. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976). (Emphasis in the original.) Since the employers never articulated what—if any—qualifications they actually applied, the employees could not offer statistics on qualified non-whites.

The employers called an expert witness to testify at trial about qualifications, but he admitted the qualifications he devised had never been applied.

THE COURT: All right. Mr. DeFrance, in this case, I believe you have already testified that the Defendants have not adopted, to your knowledge, the minimum qualifications that you recommended; is that correct?

THE WITNESS: That's correct. I don't know that they have ever been adopted.

(RT 3113; *see also* RT 3067.) One management employee who recruited in nearly all upper level jobs testified,

Q. But there were not set qualifications a person had to meet?

A. No.

Q. Pardon?

A. No.

(RT 622-23, 627-30 and 637.) A cannery superintendent conceded in deposition testimony offered at trial,

Q. You don't have any written job qualifications at Bumble Bee, do you?

A. No.

Q. Have you ever had them?

A. No.

Q. You just rely on your own judgment and the judgment of the foreman who is hiring?

A. Yes.

(Dep. Leonardo-1978 p. 2 and 46-47.) The employers neither give tests nor impose education requirements.<sup>5</sup> They make no attempt to hire on standardized qualifications, even when several people hire for the same job.<sup>6</sup> They have no written qualifications for any job at issue.<sup>7</sup> Nor with rare exceptions, do they have written job descriptions.<sup>8</sup> Witness after witness called by the employers acknowledged on cross-examination that there were no objective qualifications.<sup>9</sup> The district court cited evidence of a "general lack of objective job qualifications." (Appendix, p. A-317.) The employees offered anecdotal evidence that individuals were hired on much lower qualifications than the employers asserted at trial. (See Appendix, p. A-29.) Understandably concerned, the court of appeals remanded for findings on what—if any—objective qualifications were actually applied. (Appendix, p. A-28.) Where job qualifications are unknown, it is unrealistic to require the employees to prove the percentage of qualified non-whites. *Domingo v. New England Fish Co.*, *supra* at 1437 n.4.

Beyond this, the employees were not required to show that they were qualified under selection criteria which were them-

<sup>5</sup>Ex. 156-159; Dep. A.W. Brindle-1975, p. 30; Dep. Jorgenson, p. 7-8; Dep. Snyder, p. 12-13; Dep. Rohrer, p. 43; Dep. Leonardo-1975, p. 21; Dep. Leonardo-1978, p. 46-47; Dep. W.F. Brindle-1978, p. 49. One cannery has given home-made tests but has neither kept scores nor recorded the results, since "the proof is in the pudding." (Ex. 160.)

<sup>6</sup>Dep. Rohrer, p. 43; Dep. Jorgesen, p. 8; Dep. Snyder, p. 13.

<sup>7</sup>RT 2365, 2548, 2569, 2758, 2805, 2819 and 3316; Dep. Gilbert-1980, p. 10; Dep. W.F. Brindle-1978, p. 49; Dep. Snyder, p. 13.

<sup>8</sup>Dep. Gilbert-1980, p. 11; Dep. A. Brindle-1975, p. 29.

<sup>9</sup>RT 2365, 2548, 2569, 2617, 2642 and 3161; Dep. Aiello, p. 19. Aside from expert testimony, the only arguable listing of qualifications came in certain interrogatory answers. (Ex. 68-72.) However, the qualifications given are more modest than those asserted at trial, are often purely subjective and in any case were not actually imposed. As one cannery superintendent testified,

Q. So [the interrogatory answers] are your ideal for qualifications?

A. Yes.

Q. And Alitak may have hired on lower qualifications?

A. Oh, Yes. We always shot for the best.

Q. So your answer to Interrogatory 20.C does not get job qualifications as they were actually imposed at Alitak from 1970 onward?

A. Right.

(Dep. W.F. Brindle-1978, p. 12 and 14.)



selves discriminatory. Once they made a prima facie case of the disparate impact of subjective criteria, they were relieved of proving that they met these qualifications. To hold otherwise would have meant the plaintiff in *Griggs* had to have a high school diploma before challenging the discriminatory nature of the high school diploma requirement. Once again, only a failure to meet "non-discriminatory" standards is pertinent under Title VII. *Franks v. Bowman Transportation Co.*, *supra* at 773 n. 32.

d.

**The Court of Appeals Correctly Allocated the Burden of Showing Business Necessary for Separate Hiring Channels**

The employers complain that the court of appeals unfairly placed on them the burden of justifying their practice of using segregated hiring channels. But because the employees established the disparate impact of separate hiring channels, it fell to the employers to establish the business necessity of the practice. *Dothard v. Rawlinson*, *supra* at 332 n. 14; *Griggs v. Duke Power Co.*, *supra* at 431.

3.

**The Employees Have Shown the Impact of Each Practice They Challenge**

The employers maintain that the employees challenge the cumulative effect of a variety of practices with no more evidence than job segregation statistics. But in so doing, the employers mis-characterize the rulings below. This Court should not grant certiorari to review an issue which is absent from the case.

Sitting en banc, the court of appeals wrote,

We note that a related concern is that the "impact model is not the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding*, 740 F.2d at 707. *However, this is not such a case. The class has not*

*simply complained about the overall consequences of a collection of unidentified practices; rather it has identified specific employment practices which cause adverse impact. These specific practices which cause adverse impact may be considered individually and collectively.*

(Appendix, p. A-91 n. 6.) (Emphasis added.) It also noted the employers conceded that the challenged practices caused the disparate impact.

The statistics provide evidence of a significant disparate impact and the challenged practices are agreed to cause disparate impact.

(Appendix, p. A-81.) (Emphasis added.)

On return to the panel, the court of appeals cited proof of or a concession about the disparate impact of each challenged practice. From statistics showing 332 of 349 hires in upper-level departments of relatives were of whites it concluded that nepotism had a disparate impact. (Appendix, p. A-24.) When treating subjective criteria, it observed, "The companies concede the casual relation between their hiring criteria and the number of nonwhites in the at-issue jobs . . ." (Appendix, p. A-28.) Similarly, it commented it was "obvious" that recruiting for menial jobs from non-white sources while soliciting white applicants by word of mouth had a disparate impact. (Appendix, p. A-32.)

4.

**The Court Need Not Grant Certiorari on the Application of the Disparate Impact Approach to Subjective Practices**

While the Court has granted certiorari in *Watson v. Fort Worth Bank and Trust*, \_\_\_ U.S. \_\_\_ (1986) (No. 86-6139), to decide the suitability of the disparate impact approach to subjective practices, the employers say this case involves somewhat different issues. Under these circumstances, the Court should not grant certiorari here.



**CONCLUSION**

The Court should deny the writ of certiorari.

Respectfully submitted,

Abraham A. Arditi  
Attorney for Respondents

8

No. 87-1387

Supreme Court, U.S.

FILED

SEP 10 1988

JOSEPH F. SPANGL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

**JOINT APPENDIX**

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ,  
WELLS & FRYER  
Suite 3300  
1001 Fourth Avenue Plaza  
Seattle, Washington 98154  
(206) 623-5890

*Attorneys for Petitioners*

\* Counsel of Record

September 9, 1988

## TABLE OF CONTENTS

	<u>Page</u>
Relevant Docket Entries . . . . .	A-1
Revised Pretrial Order . . . . .	A-3
Deposition of Harold Brindle . . . .	A-8
Deposition of Mervin W. Lessley . . .	A-13
Deposition of Randall Lee Milholland . . . . .	A-19
Deposition of Russell J. Rohrer . . .	A-25
Deposition of Marvin Clay Snyder . . .	A-30
Testimony of Clarke Kido . . . . .	A-38
Testimony of Frank Peters . . . . .	A-52
Testimony of Stephen Noel Bird . . .	A-60
Testimony of Richard Gurtiza . . . .	A-63
Testimony of David Della . . . . .	A-68
Testimony of Orlando Bucsit . . . . .	A-71
Testimony of Andy Pascua . . . . .	A-75
Testimony of Michael Tardif . . . . .	A-78
Testimony of Gary Mamallo . . . . .	A-83
Testimony of Mike Eddie Antonio . . .	A-85
Testimony of William T. Pascua . . .	A-87
Testimony of Shirley Jeanne Smith . .	A-90



## TABLE OF CONTENTS (Continued)

	<u>Page</u>
Testimony of H. J. Parrish . . . .	A-105
Testimony of Jill Henderson . . . .	A-112
Testimony of Patrick Timothy Ryan . . . . .	A-114
Testimony of Joel Stromme . . . .	A-123
Testimony of Albert Belasario Pastores, Jr. . . . .	A-125
Testimony of Eugene Baclig . . . .	A-127
Testimony of Christopher Steele . .	A-131
Testimony of Phillip Fujii . . . .	A-137
Testimony of Cathlyn Hjorten . . . .	A-141
Testimony of Roderick E. Cameron, Jr. . . . .	A-144
Testimony of Arsenio Eleccion . . . .	A-151
Testimony of Alec W. Brindle . . . .	A-156
Testimony of Warner Leonardo . . . .	A-213
Testimony of Donald E. Wise . . . .	A-237
Testimony of Dr. Albert Rees . . . .	A-250
Testimony of Robert J. Flanagan . .	A-367
Testimony of Gary P. Latham . . . .	A-391
Testimony of Ronald Baclig . . . .	A-402
Testimony of Alan Lew . . . . .	A-403

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
Testimony of Cheryl Tatom . . . .	A-407
Testimony of Charley Anderson . . .	A-414
Testimony of Robert Krapp . . . .	A-422
Testimony of Richard Quirion . . .	A-432
Testimony of Eberle Mercer . . . .	A-434
Testimony of Earl Anderson . . . .	A-438
Testimony of Frank Shucka . . . .	A-447
Testimony of James W. Yonker . . .	A-453
Testimony of John R. Gilbert . . .	A-460
Testimony of Winn F. Brindle . . .	A-463
Testimony of Larry L. DeFrance . .	A-470
Testimony of Jack Aiello . . . .	A-577
Testimony of Laurie Brindle Romine . . . . .	A-586
Testimony of Elroy Kowalski . . . .	A-589
Testimony of John Lum . . . . .	A-614

# RELEVANT DOCKET ENTRIES

3/20/74	Complaint filed.
5/5/82	Revised Pretrial Order entered.
5/3/82- 5/17/82	Trial conducted.
10/31/83	United States District Court for the Western District of Washington opinion entered.
12/6/83	Order correcting opinion following nonjury trial and directing correction of judgment entered.
8/16/85	Opinion in the Court of Appeals affirming the judgment entered.
11/18/85	Order withdrawing the Court of Appeals opinion and ordering rehearing <u>en banc</u> entered.
9/2/87	Second opinion of the original panel of the Court of Appeals on remand from the <u>en banc</u> court entered.
11/12/87	Order clarifying the opinion entered.
11/12/87	Petition for rehearing denied.
12/23/87	Opinion of the <u>en banc</u> Court of Appeals entered.

IN THE SUPREME COURT  
OF THE UNITED STATES

October Term 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

Petitioners,

vs.

FRANK ATONIO, et al,

Respondents.

BRIEF OF PETITIONERS  
APPENDIX

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, )  
et al., )

Plaintiffs, )

vs. )

WARDS COVE PACKING )  
COMPANY, INC., )  
et al., )

Defendants. )

NO. C 74-145 S

REVISED  
PRETRIAL ORDER

\* \* \*

[PTO, p. 2]

ADMITTED FACTS

(2) The following facts are  
admitted by the parties. . . .

\* \* \*

[PTO, pp. 10, 14]

80. The majority of non-resident  
cannery workers are lined up by the  
cannery worker foremen after management  
has estimated the number that will be  
needed.



\* \* \*

[PTO, p. 16]

93. At least during 1970 through 1975, Bumble Bee has not advertised in media for applicants for any jobs, Nor [sic] has it posted vacancies at the cannery.

94. Non-resident cannery workers are those whose off-season residence is in the Lower 48. Some have been hired directly by Bumble Bee in Astoria.

95. At least since 1970 Bumble Bee has on occasion recruited resident cannery workers from Alaska Native villages through bush pilots. (Resident cannery workers are those whose off-season residence is Alaska.)

96. At least since 1970 some non-resident cannery workers have been hired directly by Bumble Bee in Astoria. The majority of non-resident cannery workers

dispatched to Bumble Bee through Local 37, ILWU have been Filipino.

\* \* \*

[PTO, p. 17]

102. At least since 1970 Red Salmon has on occasion recruited some resident cannery workers from Alaska Native villages. The recruitment has been through village leaders and bush pilots, among others.

\* \* \*

[PTO, p. 18]

104. The machinist foremen at Wards Cove have on occasion recommended people for machinist jobs, among other jobs.

105. Wards Cove has not advertised in the media for jobs at least since 1970. Nor has it posted vacancies at the cannery at least from 1970 through 1977. Wards Cove has called the Alaska State Employment Service in recruiting resident

cannery workers, but hasn't done any media advertising.

106. At least since 1970 resident cannery workers at Wards Cove have generally been hired for only portions of the season, during intense periods of canning.

107. At least since 1977 Wards Cove has hired some non-resident cannery workers directly at 88 East Hamlin, Seattle, Washington.

108. The majority of non-resident cannery workers dispatched to Wards Cove through Local 37, ILWU have been Filipino.

\* \* \*

[PTO, p. 19]

116. It has not generally been defendants' practice at any time since 1970 to post written notice at Bumble Bee, Red Salmon, Wards Cove or Ekuk canneries

of job vacancies which develop during the season. . . .

\* \* \*

[PTO, p. 20]

118. A company fisherman captain's job can be learned through prior experience as a company fisherman's partner.

\* \* \*

DISTRICT COURT

DEPOSITION OF HAROLD BRINDLE

[Dep., p. 2]

HAROLD BRINDLE, being first duly sworn by the Notary Public to tell the whole truth, deposed and said as follows:

\* \* \*

[Dep., p. 33]

Q. Did you ever discuss with him the necessity of housing crews together?

A. No, but there are various specific advantages for doing so.

Q. Is that for call out time?

A. Basically.

Q. That's the crux of the advantage of housing crews together?

A. Yes.

Q. Sorters would ordinarily get called out earlier than other cannery workers; isn't that correct? The fish

come in and have to be sorted into the bins before they are processed?

A. Basically.

\* \* \*

[Dep., p. 34]

Q. And they would get called out earlier than the other cannery workers; right?

A. On occasion.

\* \* \*

[Dep., pp. 35-38]

Q. When you refer to call-out time or call-out time as you understand the usage of the term refers to that time of the day when the employees are told to go to work; is that correct?

A. Basically.

Q. If the tender comes in with a lot of fish and it's early in the morning, the sorters would get called out to start the fish first; right?



A. Along with the beach gang to unload the fish.

Q. And then later in the day, perhaps, once it's in the bins, the cannery workers would get called out; is that correct?

A. Yes.

Q. And the machinists who are assigned to particular departments would get called out with them; is that correct?

A. Yes.

Q. At the same time, in other words?

A. Yes.

Q. Port engineers might get called out much earlier in the day if a fishing vessel had repairs that were needed; is that right?

A. Right.

Q. On the whole the office staff works regular hours, say, 9:00 to 5:00?

A. No.

Q. What are their hours?

A. Normally from 8:00 in the morning through 9:00 in the evening.

Q. But on the whole they are not subject to call out depending on when the tenders come in; is that correct?

A. Most normally not.

Q. They have their regular hours duties to do; correct?

A. Right.

Q. Quality control, when do they do their work?

A. During the time of canning.

Q. They would get called out at the same time as the machinists assigned to departments and the cannery workers and the sorters; is that correct?

A. That's right.

Q. Would the call-out time for all the culinary crew members be the same?

A. No.

Q. Who would get called out first?

A. The first cook.

Q. And then?

A. Probably the baker.

Q. And after that?

A. Everyone else.

Q. Would the waiters get called out before the dishwashers?

A. No.

Q. Supervisors such as the beach boss and the first machinist and the cannery crew foreman, would they have their own call-out times or would they be called out at the same time as their crews?

A. That's pretty hard to answer.

Q. Well, as a general rule?

A. Most normally if there's an early call-out, they would be first.

\* \* \*

# DISTRICT COURT

## DEPOSITION OF MERVIN W. LESSLEY

[Dep., p. 2]

MERVIN W. LESSLEY, being first duly sworn by the Notary Public to tell the whole truth, deposed and said as follows:

\* \* \*

[Dep., pp. 4-5]

Q. What did you start out as?

A. Machinist.

Q. What was the first year you worked at Red Salmon?

A. 1960.

Q. Have you worked there continuously since 1960?

A. For the canning season, yes.

Q. That's what I meant. And during the off season have you worked at Lake Union Terminal each season since 1960?

A. Yes.

\* \* \*

[Dep., p. 6]

Q. When did you become a machinist foreman at Red Salmon?

A. 1972.

\* \* \*

[Dep., p. 6]

Q. From the 1972 season onward did you have any responsibility in hiring machinists for Red Salmon?

A. Well, somewhat.

Q. Who else had a role in hiring machinists?

A. Mr. A. W. Brindle.

Q. Would you recommend machinists to him?

A. Yes.

\* \* \*

[Dep., p. 7]

Q. If there was an opening would Brindle ask you if you knew somebody that could fill the job?

A. Yes.

Q. And if you knew someone, would you recommend the person?

A. Yes. If I thought they were qualified I would, yes.

Q. If you didn't know someone, would you ask around your friends?

A. Yes.

Q. Would you do anything else to find prospective machinists?

A. Well, there would be people come in from off the street, you know.

Q. For the most part was it a question of asking around among the people you knew?

A. Well, no, I wouldn't say so.

Q. About half and half?

A. Maybe 60-40.

Q. Which is the 60?

A. Trying to find qualified people on your own and taking people who came in and applied. They would make out an



application. We would investigate their background and their qualifications.

\* \* \*

[Dep., p. 12]

Q. You have heard the term: "Filipino bunkhouse," haven't you?

A. Yes.

Q. Have you heard it used at Red Salmon?

A. I suppose I have.

Q. So far as you can tell, was it commonly used at Red Salmon up until the time of the fire?

A. Well, that was one way of designating the different mess halls.

\* \* \*

[Dep., p. 14]

Q. Is there a building that is still called the Filipino bunkhouse there?

A. Well, it was called that before. That's what it's called now, I guess.

Q. Is there a building that is called the Native bunkhouse there now?

A. It hasn't had a Native in it for years.

\* \* \*

[Dep., pp. 14-15]

Q. So, it's not called the Native bunkhouse any more?

A. It's called Native bunkhouse but there is nobody there.

Q. Nobody lives there at all?

A. No.

Q. Have you used the term "Filipino bunkhouse"?

A. I have, yes.

Q. Have you used the term "Native Bunkhouse"?

A. Yes. When I went to send somebody over to do a job there. Like

with the plumbing and et cetera, et cetera, et cetera. They have to know where they are going and et cetera.

Q. Did A. W. Brindle use the term "Native bunkhouse"?

A. I guess he has.

\* \* \*

[Dep., p. 30]

Q. When you asked around for machinists among your acquaintances, those that you turned up were all white; were they not?

A. Yes.

\* \* \*

# DISTRICT COURT

## DEPOSITION OF RANDALL LEE MILHOLLAND

[Dep., p. 3]

RANDALL LEE MILHOLLAND, called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

\* \* \*

[Dep., pp. 3-5]

Q. Were you employed by Wards Cove Packing Company?

A. Yes, I was.

Q. In what job?

A. Two jobs, Cannery Store Keeper and Cannery Tenderman.

Q. What was the first year you worked there?

A. I was trying to figure that out last night.

Q. Was that 1970?

A. '69 or '70. Yeah, 1970.

Q. You were Store Keeper then?

A. Yes.

Q. And the next year you went up  
was when?

A. '72.

Q. What was your job then?

A. Storekeeper.

Q. What was the next year you went  
up?

A. '73.

Q. Were you a Tender Engineer  
then?

A. A Tender Engineer.

Q. What was the next year you went  
up?

A. '74.

Q. Were you a Tender Engineer  
then?

A. Tender Engineer.

Q. What was the next year you went  
up?

A. 1975.

Q. What was your job then?

A. Tender Engineer.

Q. Were those the only seasons you  
worked in Alaska?

A. Those were the only seasons.

Q. What is your date of birth?

A. September 10th, 1953.

Q. So, is it correct to say that  
you were sixteen when you first got the  
job of Store Keeper?

A. Yes.

Q. Did you work on more than one  
tender while you worked at Wards Cove?

A. Three different tenders.

Q. Do you remember their names?

A. Vanguard, which was Wards Cove-  
owned; the Puffin, which was Columbia  
Wards Cove; and these were in consecutive  
years; and the Petrel, I believe, which is  
Wards Cove-owned.

Whoops. Excuse me. Columbia Wards  
owned the Petrel, if that makes any  
difference.



\* \* \*

[Dep., pp. 5-6]

Q. Did your father ever work for Wards Cove Packing Company?

A. He worked for Columbia Wards Fisheries.

Q. Had he worked for Columbia Wards Fishery before you were hired in 1970?

A. Yes.

Q. What was his job?

A. He was an accountant.

Q. Did he work in the Seattle office or in one of the Alaska fisheries?

A. The Seattle office.

\* \* \*

[Dep., pp. 8-9]

Q. Prior to becoming the Tender Engineer your first season had you had any mechanical job experience?

A. No.

Q. Had you taken any courses in diesel mechanics?

A. No.

Q. Had you taken any mechanical courses?

A. No.

Q. Had you worked on your own car prior to that time?

A. Yes.

Q. Was that the only mechanical experience you had prior to becoming a Tender Engineer the first year?

A. Yes.

Q. Had you had any prior boating jobs? In other words, jobs on boats?

A. No.

Q. Had you had any courses in navigation?

A. No.

Q. Any other marine courses?

A. No.

\* \* \*

[Dep., p. 42]

Q. That covers it. What kind of work, exactly, had you done on cars just prior to your first season as a Tender Engineer?

A. Just basic helping with maintenance, changing belts, checking--or preventative maintenance. Changing oil filters, greasing, other things with friends who had cars, like replacing starters, replacing brushes in starters--you know, just a number of things.

Q. Had you done a complete overhaul on a car?

A. No.

\* \* \*

# DISTRICT COURT

## DEPOSITION OF RUSSELL J. ROHRER

[Dep., p. 2]

RUSSELL J. ROHRER, being first duly sworn by the Notary Public to tell the whole truth, deposed and said as follows:

\* \* \*

[Dep., p. 3]

Q. How many seasons have you worked at Ekuk?

A. Since 1956 every season except one.

\* \* \*

[Dep., pp. 3-4]

Q. Last season did you work as a cannery foreman?

A. Yes.

Q. That's also known as machinist foreman?

A. Yes.

Q. What was the first year that you worked as a cannery foreman?

A. 1959.

Q. And you have worked as a cannery foreman each season since then?

A. Right.

\* \* \*

Q. Have you ever trained a reform machinist in one season?

A. No, I think not.

\* \* \*

[Dep., p. 15]

Q. Have you ever trained a salmon cook in one season?

A. Yes.

Q. Who was that?

A. Tom Cattell.

\* \* \*

[Dep., pp. 15-16]

Q. (By Mr. Arditi) How did Tom Cattell come to work for you?

A. He started as a cannery worker, I believe, in 1971.

Q. Mr. Cattell worked as a salmon cook in 1974 and '75; is that right?

A. I think that's right.

Q. Prior to that he was a cannery worker or a general worker?

A. Yes.

Q. Had he ever worked as a machinist before 1974?

A. In the cannery?

Q. Yes.

A. No.

Q. Did you promote him to salmon cook yourself?

A. Yes.

Q. How did you come to pick him?

A. His work was loading the retorts and he worked around where, with the salmon cook, and I think he worked it two or three years and he learned quite a bit about what had to be done and he



just . . . when we needed a salmon cook, why, we offered him the job.

Q. But the learning that he did for it was learning as a cannery worker or general worker; correct?

A. Yes.

\* \* \*

[Dep., p. 17]

Q. Did he have any other qualifications for the job other than what he had learned working around the retorts?

A. He had gone to night school and taken machine shop courses and it was all to run a lathe and various machine shop tools.

\* \* \*

[Dep., p. 17]

Q. So, machine shop work is not normally part of the salmon cook's duties; is it?

A. No, not necessarily.

\* \* \*

[Dep., p. 18]

Q. So, is it correct to say that everything you need to know to work as a salmon cook can be learned on the job as a cannery worker or a general worker?

A. I think some people could learn it.

\* \* \*

**DISTRICT COURT**

**DEPOSITION OF MARVIN CLAY SNYDER**

[Dep., p. 2]

MARVIN CLAY SNYDER, being first duly sworn by the Notary Public to tell the whole truth, deposed and said as follows:

\* \* \*

[Dep., pp. 2-3]

Q. You were previously employed by Bumble Bee Sea Foods Division of Castle & Cook; weren't you?

A. Yes.

Q. When did you stop your employment with them?

A. Well, I still go North for them at Naknek cannery.

Q. So, your job is seasonal?

A. Yes.

Q. Your job is cannery foreman?

A. Yes.

Q. Is that also known as machinists foreman?

A. Yes.

Q. How long have you been in that capacity for Bumble Bee?

A. Since 1968.

\* \* \*

[Dep., p. 10]

A. Well, that was "A" is what we used to refer to it.

Q. Have you heard the term "Native crew"?

A. Yes.

Q. Is that in reference to the crew that lived in Bunkhouse "A"?

A. Yes.

Q. And those would be the resident cannery workers?

A. Yes.

Q. Have you heard the term "White mess hall"?

\* \* \*

[Dep., pp. 10-12]

Q. It appears to be. Have you used the term "Filipino bunkhouse"?

A. Do I use it?

Q. Have you used the term?

A. Oh, yes.

Q. How about "Filipino crew," have you used that term?

A. Yes.

Q. "Native bunkhouse"?

A. Yes.

Q. "Filipino mess hall"?

A. Yes.

Q. "Native crew"?

A. Yes.

Q. "White mess hall"?

A. Yes.

Q. Have you heard other supervisory personnel at Bumble Bee use those terms?

A. Well, yes.

Q. Have you heard Mr. Leonardo use "Filipino bunkhouse"?

A. Yes.

Q. I am sorry?

A. Yes.

Q. Have you heard him use "Filipino crew"?

A. Yes.

Q. Have you heard him use "Filipino mess hall"?

A. Yes.

Q. Have you heard him use "Native bunkhouse"?

A. Yes.

Q. Have you hear him use "Native crew"?

A. Yes.

Q. Have you heard him use "White mess hall"?

A. Yes.

Q. Are those terms in common usage around the Bumble Bee cannery?



A. Well, I suppose they are. It's years of that.

Q. When you say, "years of that," you mean that for years they have been called by those terms?

A. That I have been going North, yes.

\* \* \*

[Dep., p. 17]

Q. But he was hired as a salmon cook?

A. A salmon cook, yes. It was a promotion.

Q. Briefly, what were his duties as a stockroom worker?

A. Just putting away the stock and dishing it out to people that come in and wanted it.

Q. When you say "stock," do you mean machine parts?

A. Well, it was everything, machine parts mostly are in a different

department. That is for the canning machines. But this is a stockroom, a general stock they needed in the canneries for everything, for everybody down there.

Q. Like cans?

A. No, not cans. But bottles, nuts, screws, just lights and brooms and scrub brushes, anything, paint.

\* \* \*

[Dep., p. 18]

Q. Is it pretty much like being a store clerk?

A. Well, it would be similar.

Q. In 1971 Mr. Frost was promoted to salmon cook?

A. Yes.

Q. Was he given any training as a salmon cook prior to the beginning of the season?

A. Oh, yes. We showed him how to operate the thing.

Q. Was this the only training or work as a salmon cook, the pre-season training that you gave him?

A. Well, then, of course, he was there the year before and, of course, the retorts are right alongside the stockroom. So, he is probably, was in there with the salmon cook in the year before and, so, more or less . . .

Q. (Interposing) So, he could watch?

A. So, he found out more or less what the operation was, you see.

Q. The cannery workers who have jobs with the retorts or in the lye wash or as inverters also work around the salmon cook; don't they?

A. Yes, they are working on the retorts, yes.

Q. So, they would have the same opportunity to observe as the stockroom man; is that right?

A. Any of them could, yes.

\* \* \*

[Dep., p. 20]

Q. If you are fairly smart, you could learn it as quickly as Mr. Frost did?

A. I suppose you could.

\* \* \*

**DISTRICT COURT**

**TESTIMONY OF CLARKE KIDO**

CLARKE KIDO, being first sworn,  
states:  
[p. 35]

1. I live at 1381 Jefferson, Idaho Falls, Idaho 83402. I am employed by EG&G as a senior engineer to do structural analysis on nuclear test reactor facilities. Prior to that, I worked for the Boeing Company as a structural design engineer. I received my B.S. from the University of Washington in aeronautical engineering in December, 1972. I am a plaintiff in this case. I worked for Wards Cove Packing Company, Inc. at its Ketchikan cannery in 1970, 1972 and 1973. I worked for Bumble Bee Seafoods at its South Naknek cannery in 1971.

\* \* \*

[p. 36]

3. When I arrived at Wards Cove in 1970, the cannery worker foreman, Salvador del Fierro, pointed out the bunkhouse our crew was to occupy. . . .

4. The bunkhouse was a two-storey [sic] wood frame building. We were housed three to four apiece in rooms which were approximately eight or ten feet by twelve feet. On the bottom floor of the bunkhouse was our messhall, kitchen and three or four rooms which our culinary workers used. Our bunkhouse is marked Building 1 on Exhibit 163. It was commonly called the "Filipino bunkhouse" just as the messhall was called the "Filipino messhall" around the cannery. . . .

[p. 37]

5. Most of the white employees who lived at the cannery stayed in what is marked Building 5 on Exhibit 163. . . .

\* \* \*



[p. 38]

8. . . . The smell attracted flies, which came through the window. Moreover, heat from the stove rose upstairs, making it uncomfortable to stay in the bunkhouse. . . .

\* \* \*

[p. 40]

15. I spoke to a person at 88 East Hamlin named Parrish. I was looking for a job of a sort that I could not find at Local 37, I.L.W.U.: namely, a job other than cannery worker. I then down to the office with Lester Kuramoto with whom I had previously worked at Wards Cove. Mr. Parrish gave each of us an application blank. I told Mr. Parrish that I was interested in a job outside of Local 37, I.L.W.U. On the application blank I wrote down that I wanted a carpenter or assistant carpenter position or a machinist or mechanic helper or

trainee position. I told him I would be willing to go to any cannery.

16. Mr. Parrish suggested that Mr. Kuramoto and I go to Local 37, I.L.W.U. for a job. From my experience at Wards Cove in 1970 I knew that Local 37, I.L.W.U. jobs were the ones which were filled primarily by nonwhites. Mr. Parrish also cut the conversation short by saying that there were no openings in any jobs. He said this before looking at my application. He did not check a list or consult with anyone in the office before saying this. Among other jobs I was interested in at the time were quality control, storekeeper and beach gang. I was available for work in Alaska in mid-May that year.

17. Since I was unsuccessful in obtaining a noncannery worker job through 88 East Hamlin, I contacted my old cannery worker foreman, Salvador del Fierro. I

asked him what other jobs I could find outside of cannery worker jobs. He said that as a cannery worker I would have to stay a cannery worker.

[p. 41]

18. Finally, I went down to Local 37, I.L.W.U. for a cannery worker job since no other options were open to me. I was dispatched to the Bumble Bee cannery, in South Naknek.

19. Prior to my application in 1971, I had some carpentry experience with my uncle as well as my father. My uncle owns an apartment building on which I did some roofing, repairs, plumbing and electrical work. I also put in windows and wall partitions. Prior to my 1971 application I had also done some carpentry work with my father around our home. This involved remodeling, putting up sheetrock, laying down floors, putting up wall partitions, doing roof repairs, a

little electrical work, putting up fences, a small amount of framing and some household plumbing.

\* \* \*

[p. 41]

21. At Bumble Bee the male Local 37, I.L.W.U. crew was housed in one bunkhouse. The cannery worker foreman told us which bunkhouse our crew would live in and which messhall we would eat in. The bunkhouse is marked Building B on Exhibit 161. The occupants were 100% non-white. The vast majority of them were of Filipino descent. The remaining ones were of Asian descent. The Alaska Native cannery workers were housed separately in what is marked Building A on Exhibit 161. There were a number of women cannery workers almost all of whom were white. They lived in what is marked Building J on Exhibit 161. Other white crews were housed in other bunkhouses.

22. Our bunkhouse was a two-storey [sic] building with rooms about 10' x 12'. We were housed four per room. Each room had two bunkbeds. The walls were of shiplap type construction. Since there was very little insulation I could feel the wind come from one side of the building right through the walls. In our room there was one bare overhead light. Since we had no closet we had to store our clothes in trunks or suitcases underneath the lower bunks or hang them on the walls. Finally, we had a small table as well as one chair.

[p. 42]

23. We use the hallways to store our rain gear, boots, hats and other working clothing. The fact that we worked with raw salmon all day gave our clothes a fishy odor. It drifted in from the hall to the sleeping rooms. Downstairs there was a small open area about 15' x 15'

which some crew members used for card games.

24. The bunkhouse the Alaska Natives lived in was approximately the same size as ours. Some of the windows were broken. They were not repaired during the time that I was at Bumble Bee. I could see dust on both sides of the windows. I could also see the paint peeling and cracking around the windows as well as on the outside of the building. The Alaska Natives also lived four to a room in bunkbeds.

25. In contrast, the women's bunkhouse was fairly new. It also had aluminum siding -- unlike our bunkhouse or the Alaska Native bunkhouse.

26. There were two messhalls at Bumble Bee cannery. One messhall served the Filipino crew and the Alaska Native crew. It is marked Building T on Exhibit 161. All of the people who ate there



regularly were non-white. The other messhall served everyone else at the cannery, including: the women cannery workers, the fishermen, the machinists, the carpenters and others. Nearly everyone who ate in that messhall was white.

27. Mugups, which are a kind of evening meal, were served in both messhalls at Bumble Bee. The people who regularly ate in our messhall were to have their mugups there. By the same token, those who ate their meals in the other messhall were to take their mugups there as well. Our messhall was commonly called the "Filipino messhall" while the other was usually called the "white messhall."

[p. 43]

28. In 1972-73 Wards Cove cannery operated again. Consequently I went back there for a second and third season. The bunkhouse had been painted, there were

fewer people in our rooms and the linen was changed somewhat more frequently. Other than that, conditions were essentially unchanged. We continued to sleep in the "Filipino bunkhouse," eat in the "Filipino messhall" and perform miscellaneous tasks our foreman assigned.

29. In 1973 our crew held a food strike to protest the quality of food served in the Filipino messhall. We had asked the cannery worker foreman Salvador del Fierro for more variety, fresh fruits and fresh vegetables. When we didn't receive them, we held a food strike. We showed up at the messhall at meal time but didn't eat. Instead, we bought food in town which we ate in our rooms. The food strike lasted about three days until we had a formal crew meeting. After that there was a slight improvement in the food.

30. In February, 1975, I was laid off from work at Boeing. When I first began looking I had trouble finding work in my field. Consequently, I took work as a laborer with Center Dozing for a short time in the spring of 1975. During that time I also worked as a survey chainman with my uncle who is a licensed surveyor. On and off I also worked as a delivery man for Product Development in the spring of 1975. Among work I was looking for was a position in the carpenter trade. In fact at about that time I took a test for admission to the apprenticeship program.

31. In the spring of 1975 I went down to 88 East Hamlin, Seattle, Washington once again to apply for an upper level position. . . .

\* \* \*

[p. 48]

Q. (By Mr. Phillips) Lets [sic] talk about housing at Wards Cove for a

minute. You stayed in which bunkhouse at Wards Cove?

A. What is called the Filipino bunkhouse.

Q. Who gave it that name, by the way, do you know?

A. The foreman designated bunkhouse that we were staying at, and everyone referred to it as such.

Q. The foreman is Salvador del Fierro?

A. That is correct.

Q. And he is Filipino?

A. Yes.

Q. That particular bunkhouse housed male members of the Local 37 crew?

A. That's right.

Q. Most of them were Filipino?

A. That's right.

\* \* \*

[p. 50]

Q. Let's talk about messing for a minute, Mr. Kido. You talk about the white messhall. Is that the name that you guys -- that's the name you guys gave to that messhall, isn't it, the main mess?

A. That is what the name that everyone seemed to give it. The women --

Q. Who else do you recall referring to it that way?

A. The non -- the white members of the cannery.

\* \* \*

[p. 70]

THE COURT: Mr. Kido, your affidavit doesn't specify your nationality, unless I am mistaken.

THE WITNESS: That's right, it doesn't.

THE COURT: I think it is probably just an oversight. But for the records, what is your nationality?

THE WITNESS: I am Japanese-American.

THE COURT: And your parents' background?

THE WITNESS: The same. Japanese-American.

THE COURT: Are they both, as far as their blood, full-blooded Japanese?

THE WITNESS: Yes.

\* \* \*



**DISTRICT COURT**

**TESTIMONY OF FRANK PETERS**

FRANK PETERS, being first duly sworn, states:

[p. 75]

1. I live at 1743 Summit Avenue, Apt. 207, Seattle, Washington 98122. I was born in American Samoa. I moved to the United States in 1970 to attend school. . . .

\* \* \*

[p. 76]

3. I graduated from Cleveland High School in 1972. I spent the next school year at Highline Community College studying business and psychology. From there I went to Seattle Central Community College for a year. I received my B.S. from Portland State University in political science in 1978. I took one quarter of graduate work there in public

administration. I also had a quarter of graduate work in political science at the University of Washington. . . .

\* \* \*

[p. 76]

5. I obtained my first job with Wards Cove Packing Company, Inc. through the cannery worker foreman Salvador del Fierro. A Samoan friend had asked me whether I wanted to go to Alaska to work for the summer. He then took me to Mr. del Fierro's house. After I spoke with him, Mr. del Fierro wrote my name down on the list of people who were going to work for him. He told me, "This is a list of my crew." Mr. del Fierro the [sic] took me down to Local 37, I.L.W.U. During dispatch my name was called. I then joined the Union.

[p. 77]

6. The company flew our crew to Ketchikan on a charter plane. When we

arrived at the cannery Mr. del Fierro pointed out two bunkhouses -- telling us that they were for our crew. Those bunkhouses are marked Buildings 1 and 2 on Exhibit 163. They were commonly called the "Filipino bunkhouses" around the cannery. For example, I heard the cannery superintendent Joe Brindle, the head machinist Ray Landry and the cannery worker foreman Salvador del Fierro all use the term "Filipino bunkhouse." Other such terms were also used around Wards Cove. For example, our crew was commonly called the "Filipino Crew." I heard Joe Brindle, Ray Landry and Joe Brindle's daughter all use this term. There were two messhalls at Wards Cove. One, which was located in Building 1, was for the male non-resident cannery workers. The other, which was located in Building 5, was for the other company employees who lived at the cannery. Our messhall was

commonly called the "Filipino messhall." Members of our crew often called the other one the "white messhall." I knew which messhall to eat in since Mr. del Fierro told us in a crew meeting when we first arrived that the Filipino messhall was where our crew was to eat.

\* \* \*

[p. 78]

9. Bunkhouse 1 was 100% non-white in 1972 through 1975. One white lived in Bunkhouse 2 in 1972-3. He ate in the white messhall rather than our messhall. The white crews lived in what are marked Buildings 3, 4 and 5 on Exhibit 163. Each year during 1972-75 about 8-10 people--all of whom were white--lived in Bunkhouse 5. Each year during 1972-75 the bookkeeper Jerry Steele--who is white--lived in Building 4. The cannery superintendent lived in what is marked H.A.B. House on Exhibit 163. Each year

during 1972-75 about six women cannery workers lived in Building 3. They were all from the Lower 48. They were all white. Japanese National egg technicians lived there too, but they were not employees of Wards Cove Packing Company, Inc. Also, the watchman lived in what is marked Watchman's House.

\* \* \*

[pp. 81-82]

18. In 1973 I asked the head machinist Ray Landry if I could become a machinist's helper. The conversation took place after church on a Sunday. He responded by asking, "What's wrong with being on the Filipino crew?" I pointed out to him that I needed more money to continue in school. He told me I needed experience in order to become a machinist helper. I asked him if there were courses I should take, but he did not answer.

Instead, he shook his head and walked away.

19. Toward the end of the 1973 season I also asked the cannery superintendent Joe Brindle what the possibility of my getting a job on a tender was. I also asked him for a machinist or carpenter job. He told me to talk to my foreman Arsenio Eleccion who was second cannery worker foreman. I did not bring this up with Mr. Eleccion since he only supervised cannery workers rather than employees in the jobs I was seeking.

20. Shortly after I returned from Alaska in 1973 I asked Jerry Steele for a clerical job or a job on a tender. Mr. Steele was the bookkeeper at Wards Cove. He told me to give him a call later on. Consequently, I contacted him a second time, but he didn't give me a definite answer. At one point he said, "We'll see." I asked him if he wanted me to call



him back yet again. He said yes, so I called a third time but could not get hold [sic] of him. I left a message but he never called back.

21. When I talked to Ray Landry, Joe Brindle and Jerry Steele in 1973, I was not told to file a written application. They did not ask me my qualifications or give me a chance to state them.

\* \* \*

[pp. 83-84]

26. Prior to my application for a carpenter job in 1973 I had worked with my father in American Samoa. He worked as a carpenter building houses, cabinet and repairing ships. I started working with him when I was 13 or 14 through the time I left when I was 20. During school I worked 10 to 20 hours per week. I also worked some Sunday [sic] as well as vacations. My work with him entailed

painting, sharpening tools, making cabinets, laying foundations, putting up house frames, laying partitions, doing roofing and helping repair boats. Also, in Hawaii during 1968-69 I worked as a cabinet maker's helper for about a year.

\* \* \*

28. Before going to Alaska in 1972 I had boating experience with my grandfather in Samoa. He is a fisherman with his own boat which is about 20 feet in length. I worked for him 2-3 times per week for about three years. Also, while I worked as a bin man I also learned to identify the various species of salmon.

\* \* \*

[p. 116]

THE COURT: Mr. Peters, for the record, your affidavit says you were born in American Samoa. Are you of Samoan descent?

THE WITNESS: Yes.

\* \* \*

DISTRICT COURT

TESTIMONY OF STEPHEN NOEL BIRD

[pp. 121-122]

STEPHEN NOEL BIRD, being first sworn, states:

1. I live at 4302 - 79th N.W., Marysville, WA 98270. I am currently employed as a shipwright by the Boatyard, Inc. in Seattle, I worked for Wards Cove Packing Company, Inc. as a tender engineer during the 1974 season. . . .

2. . . . I worked as a sailmaker for two months. Then in February or March, 1974 I was hired by Columbia Wards Fisheries at Lake Union Terminals as clean-up and helper. I was generally a go-fer, carried wood and helped put in planks for a few months. During that time I learned that the company had facilities which it operated in Alaska during the summer months which I hadn't known when I

first started. After I learned this I asked Ray Landry who was the head machinist if I could work on a tender.

3. I was hired to work as tender engineer on the Vanguard which is a dry tender. Prior to being hired as tender engineer I had no mechanical job experience. In fact, other than working on cars which I owned I had no practical mechanical experience at all. Nor had I had any practical experience with diesels. Similarly, prior to being hired as a tender engineer I had no classes in mechanics, machine repair, diesel repair or diesel maintenance. I had done some pleasure boating. However, I did not have prior marine work experience. Nor had I had any prior navigation experience.

\* \* \*

[p. 136]

THE COURT: Do you recall anyone in authority at Columbia Wards Fisheries

asking you about your prior mechanical experience, prior to the time you were hired as a tender engineer?

THE WITNESS: No.

\* \* \*

# DISTRICT COURT

## TESTIMONY OF RICHARD GURTIZA

[pp. 140-141]

RICHARD GURTIZA, being first sworn, states:

1. I live at 156 N.W. 84th, Seattle, WA 98117. I am of Filipino descent. I worked at Wards Cove Packing Company, Inc. at its Ketchikan cannery during the 1977 season as a cannery worker. . . .

2. I attended Central Washington State University during the 1974-75 school year. In the fall of 1975 I attended Yakima Valley College. My major was political science. I then attended Shoreline Community College in the fall of 1978 plus the fall and winter of 1981. In the fall of 1981 I began as an engineering major.



3. Prior to working at Wards Cove I had worked for about eleven months as a messman, oiler and wiper on an ocean-going vessel for the National Oceanic and Atmospheric Administration ("NOAA"). The vessel was 231 feet in length and was called the SS Rainier. I started as a messman whose job duties are like those of a waiter. I was then promoted to wiper which involves cleaning the engine room and assisting the engineer. As a wiper I worked directly under a licensed engineer. After that I worked as an oiler for about three months although my seaman's papers were not changed to reflect that. As an oiler I took readings in the engine room and worked with the engineers. I was also directly responsible for maintaining the diesel engines on the survey launches. . . .

\* \* \*

[pp. 142-143]

5. My job at Wards Cove in 1977 was called "hook fish." It involved unloading the salmon from the tenders onto an elevator which carried it into the fish house. I spent much of my time in the holds of tenders pushing the fish onto the elevators. Both because I spent so much time on the tenders and because of my past sea-going experience I began to ask for a job on a tender. I asked the cannery superintendent Joe Brindle for one numerous times starting a quarter or a third of the way into the season. I told him about my marine experience and my Coast Guard papers. I told him I was interested in any job on a tender. Throughout the season I also asked a number of the tender captains for work on a tender. One of the captains I asked was the captain of the Dagney.

6. My job as hook fish enabled me to see changes in personnel on the tenders. There were at least two openings after I started asking Joe Brindle for a tender job. They were on tenders which had started at another cannery and then been transferred to Wards Cove. I think the tenders were the Dagney and the Northern Pride. Also, the skipper of the Dagney told me there was an opening on his tender before the opening was filled. The individuals hired to fill these openings were white. The one hired on the Dagney was a big, burly white fellow who wore John Lennon-type glasses. I wasn't hired for either of these openings.

7. After the season was over Joe Brindle let me work on a tender called the Sable but just for the trip south to Seattle. That only lasted for about seven days and simply involved helping the captain keep watch. I was the fifth

person on the crew going south. After we arrived in Seattle I asked Jerry Steele for a job on a tender for the next season. He was the bookkeeper at Wards Cove. He would not give me a commitment for the job. Instead, he told me to talk to him later. Had he given me a commitment then I would have returned the next year. However, I did not want to go back as a cannery worker.

\* \* \*

DISTRICT COURT

TESTIMONY OF DAVID DELLA

[pp. 158-159]

Q. Mr. Della, do you have your affidavit before you?

A. Yes, I do.

Q. Let me call your attention to page 2. Initially, can you look at line 7? You say Bunkhouse 1 were one hundred per cent [sic] white. Did you mean white or non-white?

A. Non-white.

\* \* \*

[p. 160]

1. I live at 1909 South College, Seattle, Washington 98154. I attended the University of Washington during 1973-76, but did not graduate. . . .

\* \* \*

[pp. 161-162]

4. In 1974 we had two Filipino forklift drivers on our crew. They lived in Bunkhouse 1. There was a white forklift driver named Tom Slayton who worked at the cannery in the same year. He did not live in either Bunkhouse 1 or Bunkhouse 2. Instead, he lived in one of the white bunkhouses. The one white who stayed in our bunkhouse in 1974 did not eat in our mess hall. Instead, he ate in what we called the "white man's mess hall." At Wards Cove, there were a number of white women cannery workers from the Lower 48. They worked under the Local 37, I.L.W.U. contract. They did not live in our bunkhouse. Instead, they lived in Building 3 on Exhibit 163 with some members of other white male crews. Moreover, while we lived in barracks-type buildings, they had apartments. . . .

\* \* \*



[p. 168]

Q. Mr. Della, you are of Filipino descent?

A. Yes, I am.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF ORLANDO BUCSIT

[p. 171]

ORLANDO BUCSIT, being first sworn, states:

1. I live at 8830 Midvale Avenue North, Seattle, Washington 98103. I worked for Wards Cove Packing Company, Inc. as a cannery worker at Red Salmon in 1967, 1969 and 1970. I also worked at Wards Cove cannery in 1969 and 1978-1981. I worked a double season in 1969, starting at Red Salmon, then finishing at Wards Cove. In 1968, I worked for Bumble Bee Seafoods at its cannery in South Naknek. I was a cannery worker each year I worked in Alaska. I attended Yakima Valley College in 1970 and 1974-1976. I served as a boilerman in the Navy during 1971-1974. My work entailed tending boilers on aircraft carriers. These boilers

supplied power for the aircraft carriers--primarily for airplane catapults. I am of Filipino descent.

\* \* \*

[p. 172]

2. In 1980 at Wards Cove, I learned of a deckhand vacancy on one of the tenders. I was employed as what is called "hook fish." As such, I helped unload the salmon from the tenders to the dock. As soon as I heard about the vacancy I asked the cannery superintendent Joe Brindle if I could fill it. He said that I could not because I was in Local 37, I.L.W.U. I asked him before the position was filled. A deckhand on a tender was being called home because of a family emergency. I asked Joe Brindle after I learned that the deckhand was leaving but before the deckhand actually left. The vacancy was eventually filled by a white individual

from Ketchikan. In Alaska that year I also asked Joe Brindle for a job at the Lake Union terminals boatyard in Seattle. He suggested that I talk to Alec Brindle after the season was over.

\* \* \*

[p. 173]

6. There were two messhalls at Wards Cove each year I was there. One, called the "Filipino messhall," was for the male Local 37, I.L.W.U. crew. The other, which we called the "white messhall," was for the remaining employees at the cannery. No whites ate in our messhall regularly. Once in 1978 I tried to eat in the white messhall. I left because some of the machinists gave me a dirty look. Shortly after that the cannery worker foreman told us in a crew meeting that we were not to go to that messhall since there had been complaints that some of us tried to eat there. I

often walked by the white messhall. There is usually a bowl of fruit out. . . .

\* \* \*

[p. 174]

12. Similarly, at Red Salmon there was both a "Filipino messhall" and a "white messhall." Once in 1967 I tried to take a mug-up in the white messhall but the cook turned me away. He said I wasn't supposed to be there.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF ANDY PASCUA

[p. 195]

ANDY PASCUA, being first sworn, states:

1. I live at 116 West "C" Street, Wapato, Washington 98151. I worked for Wards Cove Packing Company, Inc. during the 1968-71 seasons as a cannery worker. I worked at the Wards Cove cannery in Ketchikan during the 1968-69 seasons. I worked at the Red Salmon cannery in Naknek during the 1969-1971 seasons. I worked a double season in 1969, starting at Red Salmon, then moving to Wards Cove. I am of Filipino descent. . . .

\* \* \*

[pp. 198-199]

7. In 1970 I asked the cannery worker foreman at Red Salmon how to become a mechanic or quality control person.



That year our foreman was Arsenio Eleccion. At first he reacted in an apathetic way. He simply turned around and walked away. When I pressed him, he said that those jobs were not covered by our union and that I should forget about them. As I became more persistent he told me not to make trouble, to finish my job and then to go home at the end of the season. At one point, he told me not to make waves. He said that if I did, I was going to get him into trouble. I also wanted a job in the store. Eventually, I would have liked to work in an administrative job. I did not ask Arsenio Eleccion about those jobs because of the responses he gave to my other inquiries.

8. The reason I asked Arsenio Eleccion rather than someone else is that our crew had been directed to take up any complaints we had with him. He was our

supervisor, and as such, assigned jobs, overtime, bunkhouses and mess halls.

9. In 1971, I renewed my request for a better job with Arsenio Eleccion. By then, I had a year of college and was a little more assertive. Arsenio Eleccion was more forceful in 1971 in denying my requests. In fact, I began to be afraid that my persistence would jeopardize the jobs of my other family members. At that time, my father, my brother and my cousins were cannery workers at Red Salmon.

10. One year I also asked the machinist foreman at Red Salmon how to obtain a machinist job. He told me that I had to know someone. I did not pursue my request with him because I did not have that type of connections. During the time I was at Red Salmon, I saw no job openings posted, saw no advertisements for openings in the better jobs and knew of no application procedure other than to ask my foreman.

\* \* \*

DISTRICT COURT

TESTIMONY OF MICHAEL TARDIF

MICHAEL TARDIF, being first sworn,  
states:

[pp. 237-239]

1. I live at 108 E. 21st St., Olympia, WA 98501. I am an attorney employed by the Washington State Attorney General's Office. I was employed at Red Salmon cannery as quality control during the 1969-71 seasons. I started as quality control when I was 19 years old between my sophomore and junior years in college. I am related to Ray Landry who was the cannery foreman at Wards Cove cannery then. I am white.

2. Before I applied Ray Landry told me the company was looking for someone with enough basic intelligence to be a good record keeper, to understand what the quality control job entailed and

to do what was required in the position. Prior to being hired in 1969 I did not have any college lab science courses. My only lab science courses had been in high school. I have never had any food science or nutrituion [sic] courses. All the training I received for the quality control position was on the job. I had a week to acquaint myself with the job prior to the canning season. I reviewed some written material, talked with a gentleman from the National Cannery Association who was at Red Salmon and talked with the cannery foreman and first machinist about the job. For the first few days of canning I also worked fairly closely with a machinist until I fully understood what I was supposed to do. I learned all the basic duties of the quality control position on the job at Red Salmon.

\* \* \*

[p. 240]

6. In 1969 I lived in what is marked Building 9 on Exhibit 162. All the occupants of the bunkhouse were white. We were from various crews. For example, there were carpenters and machinists as well as myself. There was a dresser, table, chair, light and shelves in my room. We lived two per room. In 1970-71 I lived in what is marked Building 11 on Exhibit 162. Again, all the occupants were white. Again, we were from various crews. For example, there were [sic] beachmen and fishermen as well as myself. (The fishermen stayed there only when no fishing was permitted.) I had a table and shelves in my room. There were also benches in the hall. We lived four per room. However, when they were fishing, the fishermen didn't stay there, so there were often fewer people in the rooms. In both bunkhouses we had single metal-frame

beds rather than bunk beds. Also, in both bunkhouses we had a bull cook who changed our sheets and made our beds. Like Building 9, Building 11 was all white the years I stayed there. I also had a chance to visit Building 10. It was similar in layout, furniture and people per room to Building 9 except for the cannery foreman's quarters. He either had an extra large room or two rooms. He also had a private bath. Building 10, like Buildings 9 and 11, was also one of the "white" bunkhouses.

7. On several occasions I had a chance to go into what was commonly called the "Filipino bunkhouse." It is Building 13 on Exhibit 162. It was a different type of building from the one I lived in in 1969. It was a large barracks-style building with a long hall while the building I stayed in the first year was more like a house than barracks.



Also, it was more crowded than either of the buildings I stayed in. In fact, people were housed 4-8 per room there even though the rooms were of equal size or smaller than the ones in Building 11 where I lived in 1970-71. There were few if any tables, chairs, or dressers in the sleeping rooms in the "Filipino bunkhouse." In fact, the rooms were so crowded there was little room for furniture other than the bunk beds. Unlike the buildings where I lived the "Filipino bunkhouse" had bunk beds rather than regular single beds. The "Filipino bunkhouse" appeared to be about the same age as the buildings in which I lived. However, in my view the facts that it was more crowded and had less furniture made it less desirable.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF GARY MAMALLO

GARY MAMALLO, being first sworn, states:

[p. 256]

1. I live at 2505 - 18th Avenue, Seattle, Washington. I am an apprentice carpenter. I graduated from high school in 1973, attended North Seattle Community College for two quarters and went to the University of Washington for a year and one-half. I worked for Wards Cove Packing Company, Inc. at its Ketchikan cannery during the 1973 season. . . .

\* \* \*

[p. 258]

9. There were two mess halls at Wards Cove. One, which was called the "Filipino mess hall," was used to feed the male cannery workers who lived in the Lower 48 during the winter, all of whom

were non-white. The other mess hall was used to feed the white crews. The women cannery workers from the Lower 48, all of whom were white, were also fed in that mess hall. In evenings, separate mug-ups were served in the two mess halls. On one occasion, I saw what was being served for mug-up in the mess hall where the whites ate. It included a variety of meats, a variety of breads, a variety of fruit, and some cookies for dessert. In contrast, the mug-up in our mess hall consisted of one type of sandwich meat, such as bologna. We did not have nearly the variety the whites did in their mess hall.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF MIKE EDDIE ANTONIO

[p. 267]

MIKE EDDIE ANTONIO, being first sworn, states:

1. I live at 3402 Jefferson, Yakima, Washington 98902. I am employed as a letter carrier for the U.S. Postal Service. . . .

\* \* \*

[p. 268]

3. In 1966 or 1967, I asked Vern Jones how to get on the beach gang. I considered this an application. He was the beach boss at Red Salmon during the years I was there. He did not offer me the job. Nor did he give me any information about how I could go about getting that job. The last year I worked at Red Salmon I asked Vern Jones the same question again. He did not offer me a job

this time either. Nor did he tell me what else I could do to obtain the job. . . .

\* \* \*

[p. 268]

5. In 1966 and 1967 at Red Salmon, I asked the first machinist how I could go about getting a machinist job. He would not give me any information.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF WILLIAM T. PASCUA

[p. 281]

WILLIAM T. PASCUA, being first sworn, states:

1. I live at 2220 West Logan, Duplex C, Yakima, Washington 98902. I am employed as film director at KIMA television in Yakima. I take care of public service announcements as well as editing, scheduling, and tracing programs. I am an assistant to the program director. I am of Filipino descent. I worked for Wards Cove Packing Company, Inc. at Red Salmon during the 1970-1972 seasons. In 1970-1971, I was employed as a slimer. . . .

\* \* \*

[p. 282]

4. There appeared to be definite racial barriers at Red Salmon. For



example, employees were housed almost entirely along racial lines. There were two bunkhouses for the male Local 37, I.L.W.U. workers. One, which housed the older men on the crew, was 98% non-white each season I was there. The other was 100% non-white during the three seasons. Only two whites lived there during the third season. Nearly all of the non-whites in these bunkhouses were of Filipino descent. Although they also held cannery worker jobs, male Eskimos were housed in two other bunkhouses. White women cannery workers had yet another bunkhouse. . . .

\* \* \*

[p. 283]

7. There were two mess halls at Red Salmon during the years I was there. One, which was called the "Filipino mess hall," fed our crew. One year I was at Red Salmon, the Eskimo cannery workers

also ate in our mess hall. We called the other mess hall at the cannery the "white mess hall." It fed the white crews, and, for two of the years I was there, the Eskimo cannery workers. However, the Eskimo cannery workers did not eat in the same dining room as the white crews. Instead, they were given a small room off to the side of the main dining hall.

\* \* \*

DISTRICT COURT

TESTIMONY OF SHIRLEY JEANNE SMITH

[pp. 321-322]

Q. Would you please describe your work experience as a demographer?

A. I have had several jobs as a demographer, the first of which was for the Census Bureau between 1969 and 1972, the second of which was for the Bureau of Social Science Research here in Washington in 1975-'76. And since that time, I have been working for the Bureau of Labor Statistics also here in Washington.

\* \* \*

[p. 324]

Q. Is there a definition of labor supply which is standard in your field?

A. Yes, there is.

Q. What is the definition please?

A. Labor supply as we use the term is synonymous with labor force--that is, the employed population plus persons who are looking for jobs and are, therefore, unemployed.

Q. Is there a standard definition of the term "labor force" in your field?

A. It is the same.

Q. Same as labor supply?

A. Yes.

Q. Is there a standard definition of work force in your field?

A. Yes. Work force is synonymous with the employed portion of the labor force, excluding unemployed.

\* \* \*

[pp. 327-328]

Q. Have you compared the seasonality of the Alaskan salmon canning industry with the seasonality of any other industries?

A. Yes, I have. It is perhaps unique, the degree to which it is seasonally [sic]. Most other industries have some element taht [sic] carries through during the rest of the year. For instance, in agriculture, there are people who--farms don't shut down during the rest of the year; they may go into other types of activities besides field production, but the seasonality of the salmon canning industry is quite overwhelming because almost the entire labor or the work force is involved for two to three months in the summer and completely outside the industry for the rest of the year.

Q. How large is the migrant component of the work force of the Alaskan salmon canning industry compared to the migrant component of the work forces of other industries?

A. It is startlingly large. From records that I have seen, over 60 percent of the workers in the salmon canning industry are migrant. We know that at least 60 percent of them migrate to Alaska each summer from the Lower 48, and a large number of people who are Alaskans working in the canneries also migrate, but I don't have statistics on that.

\* \* \*

[pp. 329-330]

Q. In studying the labor supply which defendants tap, did you do any background reasearch [sic] on the demographic characteristics of migrant seasonal labor supplies?

A. Yes, I did.

Q. What, if anything, did you conclude about the demographic characteristics of such labor supplies as compared with non-migrant labor supplies?



A. The groups of people who are responsive to migrant labor work from the limited amount of data which is available on the subject appear to be atypical of population as a whole. They--well, it stands to reason that people who are free to pick up and leave one place and go work somewhere else weren't heavily tied to the original location or in a particular job.

And the indications are that this group that is responsive to migratory and seasonal work is disproportionately made up of minority groups who don't have equal opportunities in the economic system at home.

\* \* \*

[p. 322]

Q. (By Mr. Arditi) In general, is the racial composition of migrant seasonal labor supplies representative of

the racial composition of the areas from which they are drawn?

A. No.

Q. And in what way are they not representative?

\* \* \*

[p. 333]

A. For the most part, because migrant and seasonal work draws on labor supply that is available sporadically, they tend to be people who didn't make it into the economic system in the first place at home. That is, people who are unemployed or outside the labor force, waiting for opportunities to develop. And those groups are both disproportionately made up of minorities so the migrant seasonal flow tends to be disproportionately made up of minorities.

\* \* \*

[pp. 343-345]

Q. Now, could you tell us what, if any, trends Exhibit 63 shows?

A. Exhibit 63 shows a gradual decline in the non-white portion of the industry. Actually, it wasn't gradual; it occurred in a few sort of steps over the period from 1906 to the mid-fifties. The industry began as a predominantly non-white labor supply--75 percent, as a matter of fact, of the workers at the beginning of this series were non-white. But the salmon butchering machine came into use, I think, in 1903 or something like that or it was invented in 1903. So it predated the series. and as it came into use, commonly it displaced a lot of hand butchering. And the share of the labor supply that was non-white diminished. It dropped into the fifties by around 1920 and remained between 50 and 60 percent for several years thereafter

and finally dropped a second time about 1935 when unions came into effect, dropped down to around 50 percent.

And after World War II, it dropped [sic] between 50 and 45 percent and sort of hovered there for the rest of the series.

Q. Did it stabilize at a certain point?

A. Well, it more or less stabilized with the mid-thirties. The decline between, say--I don't know--1938 or something like that and 1955 was not dramatic. 1937. From there on, it was pretty much in the 50 to 45 range.

Q. Did the percent non-white vary during the first half of the depression according to Exhibit 63?

A. In the first half of the depression, the--well, the depression began in 1929, and in the years prior to

that, from 1925 to '28, the proportion non-white was around 57, 59 percent.

Well, 56 or 57 percent. And the same figures were reported through about 1934. So there really wasn't any noticeable change in proportion non-white in that period.

Q. What, if anything, does that tell you as a demographer?

A. Well, it suggests that even in a time of job shortage that whites were not rushing into this industry and trying to grab up jobs.

Q. Was there a slight shift in the second half of the depression?

A. There was. As I said, it seemed to be it started about 1935 when the canning industry had its first unions. And at that point, the share whites actually increased.

\* \* \*

[p. 346]

Q. What, if anything, does Exhibit 4 tell you about the entrance of cannery worker unions on the scene as that might or might not affect the racial composition of the industry labor supply?

A. Exhibit 64?

Q. Yes.

A. Well, the cannery workers' unions evolved around 1935 as I said before. And the pattern of employment that I have been talking about had been going on for a long time before that. The Chinese were already being eased out, and the Filipinos had already established a fairly strong position in the industry by the time the unions were first established.

And in fact, the number of Filipinos in the industry was higher a few years before than it was right at the time and following the institution of unions.



\* \* \*

[pp. 369-370]

Q. Now, did you come to a conclusion in this case on the percent non-white [sic] in the labor supply as opposed to the work force that defendants tap for their Alaskan canneries?

A. I did, yes.

Q. And what was your conclusion?

A. My conclusion was that that labor supply was about 50 percent non-white.

\* \* \*

[pp. 386-388]

Q. In your study in this case, have you adjusted the availability labor supply for differences in skills?

A. No, I haven't.

Q. So far as you know, is it possible to do so?

A. I don't think for this industry that it is possible.

Q. And why is that?

A. Well, the types of statistics that we have to look at the industry are not complete. We have information from the industry, from the work force itself, which I have used which clearly identifies these people as available. They have come and spent their summers in the industry so we know they are available. But the detail in that information about qualifications and skills is lacking.

Then, there is the data source that the defendants have used which is the census. That identifies what people do for a living or have done most recently for a living, but doesn't tell us anything about people's availability. And in order to really focus on availability by occupation or any skilled [sic] group or anything, you have to be able to identify occupation and race and availability, all

the same individual at the same time. And you have to have sufficient information about the occupation and work history and what not to know that it really is their qualification and not just something they happen to be doing.

Q. Well, his prior occupation then in your view is a good proxy for skill or not?

A. Not if it is just single prior occupation. The last thing you were doing. Because there certainly are a lot of people who temporarily work in jobs that are completely unrelated to their skill level.

Washington has a wonderful crew of cab drivers with Ph.D.'s in physics and things like that. So capturing what a person is doing at a particular moment isn't necessarily a good indicator of what they can do.

\* \* \*

[pp. 405-406]

BY MR. DUNCAN:

Q. I don't think it did. You have previously testified in other cases to a fairly blanket assertion that seasonal industries are more likely to be non-white than white in comparison areas from which they are drawn.

\* \* \*

Q. Have you previously testified to that?

A. Yes, and I think that's what I meant by what I just said as well.

Maybe I can clarify what the problem is. We have been talking about the general labor force in a fixed location over a year-round pattern. And we have, I think you have, some extremes. You have the migrant workers who are generally both seasonal and willing to pick up and leave their location. And you

have people who are neither seasonal nor willing to leave their location.

Migrants are quite atypical of the group that they come from or they are likely to be quite atypical of the group they come from. Seasonal workers are somewhere in between. They include people who for the same reason as migrants just happen to be available. They are not doing anything else. Their economic opportunities have not been great, and this is their one chance to get their foot in the work force for the year.

So a seasonal work force is more non-white than the total labor force, but it is less non-white than a migratory group because it includes a lot of people who can continue to live their ordinary lives in their home community and just take on a little additional work.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF H. J. PARRISH

[p. 622]

Q. Mr. Parrish, would you please state your full name for the record and spell your last name?

A. P-A-R-R-I-S-H, H. J.

Q. What is your first name?

A. Horace.

\* \* \*

[pp. 622-624]

Q. Who was your last employer?

A. Wards Cove Packing Company, Incorporated.

Q. What? What did you say after that?

A. Incorporated.

Q. From responses to questions that we received in this case, they list you as Assistant Cannery Superintendent at



Red Salmon Cannery. Was that your job title?

A. No.

Q. What was your job title?

A. We had no title.

Q. Was your job a year around job?

A. Yes.

Q. Did you work at any other cannery besides Red Salmon?

A. No.

Q. Did you have any duties with Columbia Wards Fishery?

A. I had no definite duties.

Q. Did you perform tasks for Columbia Wards?

A. Yes.

Q. What did you do for Columbia Wards?

A. I would work for various superintendents fo [sic] the plant and personnel at Red Salmon, and for Mr. Brindle.

Q. What did you do for the superintendents fo [sic] the Columbia Wards Fisheries Canneries? Did you help them in hiring?

A. No.

Q. Did you help them in bookkeeping?

A. No.

Q. What exactly did you do?

A. I would help them on transportation, and if there was nobody in the office, we would do purchasing for them.

Q. If ther [sic] was no one in which office?

A. In our main office in Seattle.

Q. Aside from helping with transporation [sic] and purchasing, did you do anything for the superintendents of the Columbia Wards Fishery Canneries?

A. If they were up north and were looking for help, I would try to help them

obtain anybody that they might want to contact or replace.

Q. When you say "help," you mean employees?

A. Yes.

Q. So you helped in hiring, then?

A. I had nothing to do with hiring the employee.

Q. You helped in recruiting employees?

A. Yes.

\* \* \*

[p. 625]

Q. Were your duties for Columbia Wards Fisheries more or less incidental?

\* \* \*

[p. 627]

Q. Could you tell me which job department you had recruitin- [sic] duties [sic] for at the Red Salmon Cannery?

A. For all of the personnel, for all of the departments, mainly fishermen, cannery workers, some AFU members.

Q. Did you do the beach gang?

A. I did not hire them, but I would help recruit them, if I could.

Q. Tender?

A. The same.

Q. AFU culinary?

A. Yes.

Q. Machinists?

A. The same; yes.

Q. Quality control?

A. No.

\* \* \*

[p. 628]

Q. And the people who worked in that were employees of Wards Cove Packing Company?

A. Yes. I would recruit them and line them up.

MR. LONG: I'm sorry. Did you say lined up storekeepers for the Naknek Trading Company?

THE WITNESS: Yes.

\* \* \*

[p. 628]

Q. Who was responsible for the actual hiring at Red Salmon Cannery? Was that Mr. Brindle?

A. I would do some of the hiring; he would do some of the hiring; and the beach gang boss would do some of the hiring.

\* \* \*

[p. 636]

Q. Did you look for any personal qualities in individuals you had a role in hiring?

A. Yes, we tried to get people that were capable, that knew--they had to know the machinery, for instance, for the machinists. Carpenters had to--be real

carpenters. Tender men [sic] had to have knowledge.

\* \* \*

[p. 637]

Q. (By Mr. Arditi) But there were no set qualifications a person had to meet?

A. No.

Q. Pardon?

A. No.

\* \* \*



DISTRICT COURT

TESTIMONY OF JILL HENDERSON

[p. 695]

JILL HENDERSON, being first sworn,  
states:

\* \* \*

[p. 697]

7. There were two messhals [sic] at Red Salmon. The Filipino cannery workers ate in one. It was commonly called the "Filipino messhall." (The Filipinos were also housed in what was commonly called the "Filipino bunkhouse.") Other employees--including me--ate in the other messhall. Both the Filipino cannery workers and white cannery workers like myself were Local 37, I.L.W.U. members. However, the Filipinos ate in one messhall. We were assigned the other one. I do not recall any non-whites eating in our messhall

except some Japanese nationals. They were not employees of Wards Cove Packing Company, Inc. Instead, they were employees of a company in Japan which bought the salmon eggs. They were there to make sure the eggs were processed correctly. Tables were assigned in our messhall. . . .

\* \* \*

**DISTRICT COURT**

**TESTIMONY OF PATRICK TIMOTHY RYAN**

[pp. 705-708]

PATRICK TIMOTHY RYAN, being first sworn, states:

1. . . . I am a white male. I am related to Winn Brindle who is cannery superintendent at Alitak.

2. . . . In 1976 at age 18 I worked for Columbia Wards Fisheries as a machinist trainee. In 1977 at age 19 I worked there as seamer machinist, in 1978 at age 20 as salmon butchering machinist and 1979 at age 21 as first machinist.

3. Prior to being hired in 1976 I had no mechanical work experience in a paying job. I had been employed in a gas station to sell gas, maintain shelves and stock groceries. My duties at the gas station did not include mechanical work. I had worked on my own car as well as

other people's cars. This was for pleasure rather than compensation. It consisted of tune-ups, carburetor rebuilds and valve jobs. The only shop class I had taken was a one-year high school course which included wood as well as metal shop. I attended a general rather than a vocational high school. The course included instruction in woodworking, using wood lathes, welding, tool grinding, forging, using metal lathes and small engine repair and rebuilding. The small engines we dealt with in the course were lawn mower engines. This shop course was the only classroom training I had received in a mechanical field.

4. I consider machinist trainee an entry level job. Most of my work in the 1976 season involved working with the salmon butchering machines. The regular salmon butchering machinist was called away to replace two or three boat booms

which had broken. For about three weeks during the season I was basically doing his job. During that time I was essentially running the fish house. I learned about the salmon butchering machinery during the pre-season when I helped the machinists set up some of the cannery machinery. I continued to learn about the salmon butchering machinist's job throughout the 1976 season. While I was a trainee in 1976 I also did some pipefitting and welding. I had not done pipefitting professionally before this. The only pipefitting I had done was part of the carpentry work I did which is described in paragraph 13 below. The only welding I had done before this was in my high school shop class. During the pre-season and post-season in 1976 I helped the machinists put together and tear down salmon butchering machines, seamers, fillers and weighing machines. Finally,

I also did some parts fabrication in the machine shop at Alitak. The only such work I had done before this was in my high school shop class.

5. In 1977 I became the seamer machinist at Alitak. I had been occupied with the salmon butchering machinery during the 1976 season. Essentially, I learned about seamers during the 1976 pre-season. During the 1976 post-season I also helped dismantle the seamers and put preservative on them. After I started work as the seamer machinist I received some on-the-job training on the seamers. For example, during the 1977 pre-season the first machinist showed me how to rebuild seamer heads, tear down the seams on cans and report on the quality of the seams. I had not done any of these tasks before then. Also, during the 1977 pre-season the first machinist plus a representative of American Can Company



showed me how to make adjustments on the seamers. American Can Company is the manufacturer of the seamers at Alitak.

6. Between the 1976 and 1977 seasons I worked about 16 hours per week while I was in college at the Lake Union Terminals boatyard. My work consisted of outfitting three fishing boats. It did not consist of any engine or machinery repairs that I can recall. It did include some welding and pipefitting but not on cannery machinery. Between the 1976 and 1977 seasons I also took a course in commercial welding at Seattle Central Community College. It lasted one quarter, two nights a week, three hours a night. I was not nor have I ever been certified as a welder. By the fall of 1976 I had started college. My studies in structural engineering did not include any hands-on mechanical courses. However, some of the theory courses I took

on metals were helpful though not essential to my work as a machinist.

\* \* \*

[pp. 708-709]

8. I was not employed between the 1977 and 1978 seasons. Nor did I do any mechanical work except for repairs on my own car. This consisted of rebuilding and replacing the engine and transmission.

9. In 1978 I became the salmon butchering machinist at Alitak. I learned the job while I worked as a machinist trainee in 1976. In fact, during the 1976 season I learned both the seamer machinist and salmon butchering machinist jobs. I could go to the cannery foreman or first machinist for consultation since they had substantially more general mechanical experience than me. . . .

10. Between the 1978 and 1979 seasons I worked 16 hours a week at Lake

Union Terminals again. I was still in college during this period. I also worked full time during a two and one-half week break in school in March, 1979. I worked on the rebuild of two filler and cutter units for Alitak there. I worked under the supervision of Elroy Kowalski who told me what to do. When I was in school he would do the work on the filler and cutter units by himself.

\* \* \*

[p. 758]

Q. Now, if I understand your testimony correctly, you felt that you were qualified to be a seamer machinist after the two or three weeks that you spent in the 1976 preseason plus the 1977 preseason, plus the first few weeks of the 1977 season, is that correct?

A. Yes.

Q. However, at the time that you were hired as the seamer machinist, and

that you held that job, the only experience that you had was the two or three weeks in the 1976 preseason, is that correct?

A. Yes.

\* \* \*

[pp. 758-759]

Q. (By Mr. Arditi) Is it fair to say, then, that while you held the job as a seamer machinist, you were learning?

A. Yes.

Q. Now, do you have exhibit 640 in front of you?

A. Yes, I do.

Q. You mentioned a number of critical duties for the seamer machinist. Did you learn any of those critical duties during the 1977 season?

A. Yes, I did.

Q. So prior to the time that you were hired in that job in 1977, you were not able to do all of the things that you

have identified as critical duties, is that correct?

A. Yes.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF JOEL STROMME

[p. 778-779]

JOEL STROMME, being first sworn, states:

1. I am a 33 year old white male and currently reside at 5687 Doren Road, Acme, WA 98220.

2. I worked for Columbia Wards Fisheries at its Ekuk cannery during the 1970 season as a tallyman and deckhand; during the 1971 season as a deckhand; and during the 1972 season as a tender engineer.

3. Before working for Columbia Wards Fisheries I had worked as a laborer and a logger.

4. Prior to 1972 my boating experience was limited to my past work at Ekuk as a deckhand and to pleasure boating on lakes.



5. My practical mechanical experience was limited to work on my own car, which is pretty good.

6. During the winter of 1971-72 I took refrigeration and diesel mechanic courses at Bellingham Tech.

7. However, neither was helpful. I could have done tender engineer's work without them just with my auto experience. The tender I worked on in 1972 did not have refrigeration equipment.

8. My work during 1972 required only minor repairs such as replacing injectors and hose fitting for engine coolers. The major repair work was done by the port engineers.

9. Anyone who had a lot of experience working on his car could have done the work.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF ALBERT BELASARIO

PASTORES, JR.

[p. 831]

Albert Belasario Pastores, Jr., being first sworn, states:

1. I am a Filipino male residing at 3705 South 205th Place, Kent, Washington. . . .

2. . . . In 1971 I was sent to Bumble Bee by Local 37, I.L.W.U., again as a slimer. . . .

\* \* \*

[p. 832]

4. I asked Rudy Rodriquez, the cannery foreman, why there were no Filipino machinists, because I did not want to be a slimer in 1971 because the previous year I did not like the work. I asked him how to get another job. Rudy told me that Filipinos were not supposed

to have the other jobs. I did not ask anybody else about job possibilities because I had been instructed when I got there that if I had any questions, I was to direct them to Rudy exclusively. I considered Rudy to be a part of management, and I was not aware of any place at the cannery where I could apply for another job. He said that if I made waves about it, that would probably cause a lot of problems, and that discouraged me from making any further inquiries. I was not aware of any openings for machinists jobs posted at the cannery or any advertisements.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF EUGENE BACLIG

[pp. 869-870]

EUGENE BACLIG, being first duly sworn, states:

1. My address is Route 4, Box 4352, Wapato, Washington 98951. I am of Filipino descent. . . . I worked for Wards Cove Packing Company, Inc. at Red Salmon during the 1969-72 seasons. I also worked for Wards Cove Packing Company, Inc. at Wards Cove Cannery during the 1973 season.

\* \* \*

[pp. 870-871]

3. When we arrived at Red Salmon, Mr. Eleccion told us which bunkhouses we would be staying in. They are marked Buildings 12 and 13 on Exhibit 162. I stayed in Building 13. Buildings 12 and 13 were commonly called the "Filipino

bunkhouse." Seven of us lived in a single room each of my four seasons at Red Salmon. It was about fifteen feet by fifteen feet with three double bunkbeds plus a single bed. The only furniture in the room was one small homemade table. There were no bathroom facilities in the bunkhouse. Instead, we had to use a shed near the bunkhouse. The bunkhouse was old in appearance, with peeling paint. The company did not provide someone to fix the beds or clean the bunkhouse.

4. The Alaska Native cannery workers were housed separately. They lived in Building 15. Sometimes, they also lived in Building 14. There were yet other bunkhouses for the white crews.

5. . . . There were two messhalls at Red Salmon.

6. One, which was called the "Filipino messhall," was used to feed our crew. Mr. Eleccion assigned our crew

this messhall. One or two years there were two or three whites who lived in our bunkhouse. They usually ate breakfast plus one or two meals in our messhall. . . .

7. The other messhall, which we called the "white messhall" fed the other crews besides ours. The Alaska Native cannery workers ate there. However, they did not eat in the same room as the white crews. Instead, they had a small dining room off to the side of the messhall. Unlike our messhall, the white messhall had an automatic dishwasher. The Japanese egg technicians also ate in the white messhall at a table in the back. They were not employees of the company.

8. At Wards Cove, just as at Red Salmon, housing was assigned essentially along racial lines. There were two bunkhouses for the Filipino crew. The white crews lived apart from us in other



bunkhouses. There were white women cannery workers from the Lower 48 at Wards Cove. They did not stay in the same bunkhouse as us. Instead, they stayed in what is marked Building 3 on Exhibit 163. Members of the white crews lived in the same building. There were also Japanese national egg technicians at Wards Cove. Again, they were not company employees, but employees of the purchaser of the salmon eggs. They also stayed in Building 3.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF CHRISTOPHER STEELE

[p. 910]

CHRISTOPHER STEELE, called as a witness on behalf of the plaintiffs herein, being first duly sworn, testified as follows:

\* \* \*

[pp. 910-911]

Q. First of all, Mr. Steel, can you turn to page two of the affidavit you have in front of you?

Is that your signature on line 27?

A. Right.

Q. Now, are the statements in this affidavit true?

A. Right.

Q. You made a correction at lines 6 and 7 which you penciled in. You crossed out "no prior navigation

experience and no prior boating work experience.

Can you tell me why you crossed those out?

A. I remember making that trip South with Doni Brindle in '67, and I went on several of my days off following the fishing ground rules with him.

Q. About how many days off did you go out on?

A. Oh, five or six, sir.

Q. How long is the trip South?

A. Four days.

Q. Is Doni Brindle a friend of yours?

A. Yes.

Q. Okay. Is he a relative of Joe Brindle?

A. Yes.

Q. And how long have known Doni Brindle? [sic]

A. Ah, fifteen years, or so.

Q. The navigation experience, then, would that consist of standing wheel watch at times?

A. Right.

Q. Now, at lines 24 through 25, you also crossed that out. Can you tell me why you crossed that out?

A. Well, the refrigeration--the Vanguard doesn't have any. That was after I was engineer on it.

Q. Okay. In other words you took the refrigeration course after you became engineer?

A. Right.

\* \* \*

[pp. 913-914]

CHRISTOPHER STEELE, being first sworn, states:

1. I am a white male residing at 10926 - 127th Place N.E., Kirkland, WA 98033. I worked for Wards Cove Packing Company at its Wards Cove cannery during

1966-71 and 1972-present. I was in the service between the 1971 and 1972 seasons. My father was Gerald Steele who was bookkeeper at the cannery when I started. He later became the cannery superintendent there.

2. My first job at the cannery was machinist helper. I was 16 years old at the time. I had not had any prior mechanical work experience. However, I had done some work on my own car. Prior to becoming a machinist helper the only mechanical course I had taken was a high school metal shop course. I had also taken a high school wood shop course. I worked as a machinist helper at Wards Cove for three seasons.

3. In 1969 I became engineer on the Vanguard which is a Wards Cove Packing Company tender. The Vanguard is a dry tender which means that it does not have facilities for refrigerating salmon.

Prior to becoming engineer on the Vanguard I had no prior experience working on diesel engines, no prior navigation experience and no prior boating work experience. In about 1970 I [sic] one-semester courses at Trident in refrigeration, diesels and navigation. I do not recall the precise year I took these courses. However, I do recall that it was after my first year as engineer on the Vanguard. The navigation course was a night school course. Before starting work as an engineer on the Vanguard my only mechanical work experience had been around the cannery but not on boats.

4. After I left the service I became a deckhand on the Whale for the 1972 seasons. Then in 1973 I became the skipper of the Vanguard. Prior to 1973 my only boating work experience was my prior jobs at Wards Cove which I have listed above. I do not recall exactly but I may



have taken a brush-up night school course in navigation after the one I took in about 1970. I have also taken a navigation course at the YMCA. However, I took that course after I had already been working as a skipper on the Vanguard.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF PHILLIP FUJII

[p. 925]

PHILLIP FUJII, being first duly sworn, states:

1. I am a Japanese male residing at 202 West Olympic Place, Seattle, Washington 98119. I graduated from Franklin High School in Seattle in 1971. I received a B.A. in Urban Planning from the University of Washington in 1975. I have completed the course work for a certificate in urban design during two years of graduate school. From 1976 through 1978, I worked for the Renton Planning Department. Then I worked for Don Miles Associates, an architectural firm in Seattle during 1978. Since then I have worked for the City of Seattle, Department of Community Development.

\* \* \*

[pp. 926-927]

5. Prior to cannery work from late 1969 to 1971 I worked at Mount Baker Cleaners. My jobs at the cleaners included mainly cleanup and maintenance of the machines and equipment, including the pressers, the washers, dryers and some of the steam pipes. I oiled, cleaned, and changed lint baskets on the pressers. I changed gaskets on the washers and removed "muck," sediment that gathered in the bottom, from the washers. I also added solvent and read meters on the washers. I cleaned lint baskets and removed foreign objects from the dryers. I opened and closed the valves of the steam pipes and sometimes performed makeshift repairs. All of the training for this job was on-the-job training and my work was checked by two supervisors and the owners of the dry cleaners.

\* \* \*

[p. 930]

Q. The foreign object that you removed from the dryer, wasn't that simply reaching in the dryer and pulling out buttons that had fallen off the shirts?

A. Yes, and changing the wind basket periodically.

Q. Now, the makeshift repairs you refer to in line 6 to the steam pipes, that was really just grabbin [sic] a piece of cloth around leak to keep it from leaking any further?

A. And also turning off the valves, opening and closing valves; if there was a major leak we would see that and then we would turn off the steam valve and we would makeshift repair.

Q. But the repair work you did was simply rapping [sic] it with a cloth?

A. Yes.

Q. It was the owners or your supervisor who actually fixed the pipes that leaked?

A. That is correct or they subcontracted it out.

\* \* \*

# DISTRICT COURT

## TESTIMONY OF CATHLYN HJORTEN

[p. 939]

CATHLYN HJORTEN, being first sworn, states:

1. . . . I worked for Bumble Bee Seafoods as a waitress in 1970-71 and as a cannery worker in 1980. I am presently employed as a dental hygienist. I am white.

\* \* \*

[p. 940]

4. There were two messhalls at Bumble Bee, namely: the one I worked and ate in; and, what was generally called "the Filipino messhall" around the cannery. When the fishermen were there, about 300 people--almost all of whom were white--ate in our messhall. Several non-white employees also ate there each year. However, the largest number who did was



about ten in 1980. Several Japanese national egg technicians ate in our messhall each year as well. In 1980 there were 20 or more white male cannery workers. They ate in our messhall. Similarly, the women cannery workers, most of whom were white, ate in our messhall. So did two black male cannery workers. Some of the white cannery workers who ate in our meshall were from the Lower 48. In contrast, each year the people who ate in the "Filipino messhall" were almost all non-white. I knew that because I could see them lined up outside the messhall waiting to go in just before meal times. The non-white who ate there included the male Filipino cannery workers from the Lower 48 plus the male Alaska Natives whose jobs I can't recall. It was understood at the cannery where one was to eat.

\* \* \*

[p. 941]

7. I was assigned a bunkhouse each year I was at Bumble Bee. For example, in 1980 whoever drove us in from the airport dropped us at the bunkhouse we would be staying in. It was one of two women's cannery worker bunkhouses in 1980. It is marked Building J on Exhibit 162. The Filipino cannery workers stayed in one bunkhouse. The 20 or more white male cannery workers stayed in another bunkhouse. I do not know where the one or two Black male cannery workers were housed although I often saw them hanging around the building where the white male cannery workers were housed.

\* \* \*

**DISTRICT COURT**

**TESTIMONY OF RODERICK E. CAMERON, JR.**

[pp. 994]

RODERICK E. CAMERON, JR., called as a witness on behalf of the plaintiff, being first duly sworn, testified herein:

\* \* \*

[pp. 994-995]

Q. I would like to trace your job history a bit, if I may. Prior to the time that you started working as a warehouseman, you worked for the Seattle School District?

A. Yes, I did.

Q. And did your job consist of cleaning buildings at night?

A. Yes.

Q. And did you also operate the boilers?

A. Yes, I have a license.

Q. And is that essentially it as far as your job duties went with the school district?

A. I operated them and then in the summer time you would tear the boilers down and clean them out real good and repair the pumps.

Q. Now, did the Seattle School District have a repair man or a service man or a mechanic who repaired the boilers?

A. As far as repairing, retubing of the furniace part, the oil burner part ws.

Q. So was it they who did the major repair work then on the boilers?

A. Well, the big thing, like I say, we would replace like valves if they leak, water glasses, repair the pumps.

Q. Prior to your work there you were in the Navy?

A. Yes, I was.

Q. And what did you do in the Navy?

A. I was a signalman, quartermaster.

Q. Before that you were in high school, were you not?

A. Yes, I was.

\* \* \*

[pp. 996-998]

Q. Did you receive any training from the school district in operating the boilers?

A. Yes, I did.

Q. And that was provided by the school district?

A. Yes, they had a school.

Q. Now, aside from the high school metal shop and the training you received from the school district, have you have [sic] any other mechanical training?

A. Other than hauling my own car engines and that, no.

Q. So aside from those two courses, have you had any other mechanical courses?

A. No.

Q. Have you worked on your own car?

A. Yes.

Q. And have we covered your mechanical experience now prior to 1968?

A. Pretty much so, I would say, yes.

Q. In 1968, you worked at Naki (phonetic) Packing Company, is that correct?

A. Yes, I did.

Q. Was that your first season in Alaska?

A. Yes.

Q. And when was your next season?

A. 1970, I think.

Q. And who did you work for then?

A. Columbia Wards Fisheries.



Q. What was your job title, please?

A. Helper.

Q. Was that machinist helper?

A. Yes.

Q. And did you return in 1971?

A. Yes, I did.

Q. What was your job then?

A. The iron chink man.

Q. Is that a salmon butchering machine?

A. I guess so.

Q. Okay, did you return the enxt year?

A. Yes, I did.

Q. And what was your job then?

A. The same.

Q. Now, was your year at Nacket (phonetic) the first year you ever saw salmon butchering machinery?

A. Yes.

Q. And you were the casin man at Nacket, you weren't working with the salmon buthcering [sic] machinery, is that right?

A. I was the casin label man, I was over there to help during the preseason.

\* \* \*

[p. 999]

Q. Now, was it during your 1970 season, as a helper, at Ekuk, that you learned the salmon butchering machinist job for the next year?

A. Yes.

Q. Once you became salmon butchering machinist, did something happen that you could not fix, would go to the cannery foreman for assistance? [sic]

A. Nothing happened that I couldn't fix.

Q. Well, was he available for you to go to if something happened that you couldn't fix?

A. I suppose he was.

\* \* \*

[p. 1005]

THE COURT: Did you have any mechanical training at all in the service, in the Navy?

THE WITNESS: No, sir.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF ARSENIO ELECCION

Arsenio Eleccion, being first sworn, states.

[p. 1089]

1. I am a Filipino male, residing at 1503 South Stevens, Seattle, Washington. I was employed by Wards Cove Packing Company, Inc. at Red Salmon cannery through 1972 and at Wards Cove from 1973 to the present. I worked at Red Salmon almost every season from 1943 to 1972.

\* \* \*

[pp. 1089-1090]

3. In 1943 and 1944 almost all of the people who worked in the fish house were Filipino. In both years we had two blacks and there were no whites. The people who have worked in the fish house

up to the present have been mostly Filipino and there have been no whites.

4. From 1943 up until 1972, all machinists at Red Salmon have been white.

5. From 1943 to 1972, all office workers at RED Salmon have been white.

6. All employees who worked in the store at Red Salmon from 1943 to 1972 have been white.

7. From 1943 to 1972 all tender operators have been white.

8. From 1943 to 1972 among the beach gang members there have been no Filipinos, no Chinese, no Japanese, and no blacks. From 1949 on there have been Alaska Native beach gang members. However, these Eskimos were from Seattle.

9. Since 1943 the Filipino crew has had its own bunkhouse. There have been almost no white people living in the bunkhouse. At no time since 1943 did any of the Filipino cannery workers live in

the same bunkhouse as the machinists or the beach gang or the Eskimo cannery workers. The Eskimo members of the beach gang did not live with the rest of the beach gang; they lived in the Eskimo bunkhouse. That was true in 1949 through 1972.

10. Since 1943 the Local 37 crew always lived together. There were two Filipino bunkhouses and two Eskimo bunkhouses.

11. Ever since 1943 there had not been any Filipino, Japanese or Chinese fishermen at Red Salmon. There had been a few Native Alaskan fishermen. The fishermen had their own bunkhouse but the Alaskan Native fishermen lived in the Eskimo bunkhouse. In 1972 the few Alaskan Native fishermen lived in the Eskimo bunkhouse also.

12. In 1943 the Alaska Native beach gang members did not eat with the other



beach gang members; they ate in the Filipino messhall.

\* \* \*

[p. 1091]

15. In 1943, the Alaska Native beach gang members ate in our mess hall. In 1969 the Alaska Native cannery workers started to eat in the fishermen's messhall.

\* \* \*

[p. 1091]

17. The carpenters at Red Salmon have had their own bunkhouse since 1943. Carpenters have always been white also.

\* \* \*

[p. 1096]

Q. Alright, when did--alright, when did you start working for Wards Cove Packing Company?

A. Well, when Mr. Brindle bought the Red Salmon in 1949, then I started to work with Brindle company.

Q. Okay, and did Wards Cove Packing Company own the cannery since 1949?--I will say it again, did Mr. Brindle own Red Salmon since 1949?

A. Yeah, they bought the cannery in 1949.

\* \* \*

DISTRICT COURT

TESTIMONY OF ALEC W. BRINDLE

\* \* \*

[p. 1100]

Q. Then on--still on page 13, paragraph 49, line 23, do you have a correction there?

A. Yes, there is a reference to individual fishermen earning shares in Bristol Bay of \$120,000. That is not quite correctly stated. What it really means is that the bulk earning was \$120,000, we have no idea how the boat captain would divide the earnings.

ALEC W. BRINDLE, being first duly sworn, on oath deposes and says:

\* \* \*

[p. 1114]

1. I am the President of Wards Cove Packing Company, Inc., and a comanager of Columbia Wards Fisheries. I

have held that position since August of 1977, following the death of my father A. W. Brindle on July 4, 1977.

2. I am 44 years of age and was educated as a lawyer, being admitted to practice in both the state of Alaska and the state of Washington. I obtained the degree of Bachelor of Law from the University of Washington in 1963 and also hold a Bachelor of Arts Degree in Political Science from the University of Santa Clara.

\* \* \*

[p. 1118]

13. Readyng the fish camps and canneries for operation is accomplished during the months of May or June, depending on cannery location and timing of the expected run.

14. Preseason work is intense, involving extensive overtime, and must be accomplished in a short period of time.

Some tenders carry supplies and equipment to the facilities during the preseason. In addition to dewatering the facility and reinstalling equipment, docks are repaired and pilings are replaced; boats are launched and dewatered; canning equipment is tested, lubricated and adjusted; water systems are replumbed; and other tasks necessary to restore the facility to viable operation are performed. Often new buildings or docks are constructed before the season.

15. The intense period of preseason work allows minimal time for training unskilled workers for skilled jobs. Because of this, it is not practical to do so.

16. When the cannery is open and running, the cannery workers arrive just before the commencement of fishing operations. If they are idle prior to canning they are often given unskilled

work as called for by their contract, such as grass cutting and cannery cleanup. (See infra, Miscellaneous Work.)

\* \* \*

[pp. 1122-1123]

32. The hiring policies of Wards Cove and Columbia Wards during the entire case period have been to select the best people for any particular job without regard to race. Two of the Columbia Wards Fisheries superintendents, Carl Aspelund of the fish camp at Craig and Emil Norton of the Icy Cape cannery, are Alaska Natives. Sam Yoshida of Japanese descent is an employee of Columbia Wards Fisheries and is egg production manager in charge of the Egg Sales Department. He has the status of a cannery superintendent. Osamu Marao, who is Japanese, is employed in the home office of Wards Cove with the title of assistant superintendent. We have many other



minorities on our home office staff: Pete Gasca, of Chicano descent is office manager of Columbia Wards, is an officer of CWC Fisheries, Inc., and he is responsible for Wards Cove's most sensitive financial data. Also of Filipino descent is Jesus Canon, an office manager, Wards Cove cannery at Ketchikan and Juanita Quiban, Mexican assistant accountant Columbia Wards Fisheries. A complete list of minorities employed in the office of Wards Cove and Columbia [sic] Wards, 88 East Hamlin Street, Seattle, Washington, is attached as Exhibit A.

33. The primary consideration in hiring for all jobs at our facilities is the skill and experience of the person under consideration. Race is not a consideration or factor in hiring, except for affirmative action considerations.

34. The more skilled, experienced employees we can hire, the less time and effort is lost in on-the-job orientation, training, and inefficient, nonproductive activity.

35. Our policy and practice is to adhere to the union rehire preference clauses and to offer employment in the same jobs to past satisfactory employees for the new season. Employees, including nonresident cannery workers, take advantage of these clauses to secure employment.

36. Hiring for all jobs except resident cannery workers, spring and fall workers, and the majority of nonresident cannery workers takes place at our home offices in Seattle and Astoria during the first three months of the year. Most employees, particularly in the skilled jobs, are hired between January 1 and April 1 each year for the upcoming

season. The Machinists and Alaska Fishermen's Unions are generally notified by mid-April by our companies of the names of persons hired in jobs under their jurisdiction. Cannery workers are hired a little later in May or June. Each location has slightly different timing depending on the commencement of the fish run.

37. The rehire preference rights of past employees are respected in determining the number of vacancies to be filled for the new season. The remaining vacancies are filled from amongst those who seek employment with us during the fall and winter preceding the upcoming season. We seldom look to applications for the preceding season in filling openings for the upcoming season. Rehire preference rights are included in the union agreements for cannery workers, machinists, carpenters, and the APU.

\* \* \*

[pp. 1125-1126]

43. . . . None of the cannery worker foremen at any of our facilities are vested with any authority to hire for any position outside the cannery worker department, nor are they authorized to even discuss those jobs on behalf of management.

\* \* \*

[pp. 1126-1127]

49. It also has been my observation that many Alaska Natives have a distinct preference for fishing. In fishing there is always the possibility of large earnings, even though in some years the average earnings may be moderate. We have had individual fishermen earning shares in Bristol Bay of \$120,000, at Chignik \$45,000 man share, and Southeastern of \$16,000 man share during the case period. In Alaska talk of these high liners is a

popular subject of conversation so it is natural for residents to be attracted to these jobs. Our fishing fleets at Ekuk, Craig, Chignik, and Hoonah are almost entirely Native. We have many Native fishermen at Kenai and Alitak as well. We have also had Native fishermen at Wards Cove cannery.

\* \* \*

[pp. 1127-1128]

52. Local 37 of the International Longshoremen's and Warehousemen's Union (I.L.W.U.) has had the union contract for cannery worker jobs with us, except for the Ekuk facility, throughout the case period. Local 37 is predominantly Filipino in composition and almost entirely Asian.

53. The hiring process at Local 37 works like this: the superintendent will tell his cannery worker foreman how many personnel are needed for a season. The

cannery worker foreman will then prepare a list of persons based upon those who worked at the cannery the previous season and who had not been terminated. The cannery worker foreman attempts to contact these employees to confirm their availability and advise them of the date of dispatch. Within about a month from the time of receipt of the request from the cannery superintendent, the foreman furnishes a list to Local 37 president, Tony Baruso, or his predecessor Gene Navarro. Baruso will examine the list and delete the names of those who have moved or died and will add names to the list if more employees are needed than had worked the previous season. These names are added from members who may wish to work in Alaska or from new applicants. On the day of dispatch, the union dispatcher in the union hall reads the names from the list and when, or if, the individual is present



and responds, his union book is checked to verify his dues payments are in order. If the member's book does not indicate he is current in his dues, he is referred to the union secretary-treasurer who is located in offices immediately adjacent to the hall. The secretary-treasurer will either collect past dues or straighten out some other problems with the member's book. At the time of dispatch, one of our employees is also normally present.

54. Beginning in the late 1960's, our companies first started to find a market for salmon eggs in response to market demands from Japan. The product is "sujiko" and consists of eggs sorted by grade, treated in brine solution, and packed for export. Because the product is unique to the Japanese market, our customers have provided technicians to supervise this. They are Japanese Nationals and have been housed and fed at

the canneries. For some reason, the Local 37 male workers refused to work in the egghouse under supervision of the Japanese without over time. As an example, attached is a copy of Exhibit 435A a complaint from the Local 37 delegate at Wards Cove cannery in 1970 demanding over time for the work in the egghouse. Accordingly, we have looked outside Local 37 as a source of labor for the egghouse. These workers have been predominantly white, have been hired by the superintendent from applicants with little input from Local 37, but have been required to pay union dues.

55. On the day of dispatch, our employee in attendance at the union hall will present a list of egg workers to Baruso for union approval. Baruso will sometimes negotiate additional jobs at that time or replacements for those egg

workers who do not confirm employment. Baruso will add names of female workers to this list [sic]. The female egg-house workers added by Baruso have been nonwhite.

56. Local 37 thus produces an over supply of Asians, Filipinos in particular, in the unskilled cannery worker jobs. We continue to use Local 37 because it has a contract with all of our facilities except Ekuk.

\* \* \*

[pp. 1128-1129]

57. There is a high turnover rate of our employees from one season to the next, particularly in the unskilled jobs. Because of this, and because of the lack of time which would be required to stop work and provide training during the season, we provide very little on-the-job training; that is, the type of training

that would turn a "greenhorn" into a machinist.

58. Because of the lack of time and personnel available for training at a salmon cannery, skills or qualifications cannot be considered "readily acquirable" unless they can be acquired within a matter of days with a minimal amount of training time required of supervisory and other skilled personnel.

59. To maximize production and minimize the amount of training which must be done at the canneries, we attempt to hire experienced persons in all job categories. We have found that because of the intensity of operation, experience in every cannery job is preferable.

\* \* \*

[p. 1134]

61. Qualifications required for any individual position depend to a certain extent on the cannery involved, the age

and condition of equipment, the expected harvest of fish, skill level of other incumbents and supervisors, and other such factors. . . .

\* \* \*

[p. 1135]

67. There are very few promotions during the season. If a vacancy does occur, we feel we are better off hiring a replacement from outside rather than creating an empty spot in the cannery and then hire another to fill that spot and pay him a season's guarantee.

\* \* \*

[p. 1137]

79. Workers are housed primarily according to job department and time of arrival. The larger cannery worker bunkhouses are generally not opened up during the preseason. They are generally opened up and prepared for occupancy shortly before the cannery worker crews

arrive or upon the cannery workers arrival. This is typically within a few days of the anticipated beginning of the salmon run at each location. By the time the cannery workers arrive, most other employees have already begun working and have been housed. By the time the cannery workers arrive, there are generally few, if any, available spaces except in the cannery worker bunkhouses.

80. Cannery workers are housed for the shortest period of time of any employees and do not need the better insulated buildings required for the noncannery worker employees who arrive at the cannery earlier and stay later than the cannery workers.

\* \* \*

[p. 1138]

86. In a general sense the policy of our companies is to provide housing at the various plants by job classification.



The higher paid employees receive slightly to somewhat superior housing facilities. The machinists, for instance, are our highest paid group of employees and also they spend more time at the cannery than the others. The machinists are the first ones to be sent North to the canneries to open them up and will spend three to six weeks getting the cannery ready to run. The cannery workers, on the other hand, arrive just shortly before canning is to commence because they are not needed for any significant amount of work outside the canning operation.

87. As workers arrive during the preseason or during the season the housing will develop like a series of concentric circles. The first to arrive will be given Bunkhouse A; the second group Bunkhouse C and so forth.

\* \* \*

[pp. 1139-1140]

91. We provide substantially equal messing to all employees regardless of race. The leaders of Local 37, the bargaining representative for nonresident cannery workers, have traditionally demanded Oriental and Filipino food, a separate menu, and separate eating and cooking facilities for its members, most of whom are Filipino and Asian. Management has acceded to these wishes.

92. The Local 37 contract provides for a separate culinary crew for the Local 37 crew.

93. At Wards Cove, the food preparation and storage area ("kitchen") of the Local 37 mess is larger and as well equipped than that of the AFU mess. The Local 37 kitchen is about 777 square feet whereas the AFU kitchen is about 476 square feet. The Local 37 kitchen was remodelled and added to around 1977 or

1978. Prior thereto, the Local 37 kitchen was about 407 square feet. The AFU kitchen has also been remodelled since its construction in the 1930's. Thus, prior to the construction of the Local 37 kitchen addition, the kitchens in both messes were about the same size.

94. The quality and quantity of food served in mess halls is the responsibility of the steward or cook in the mess hall. Virtually all complaints about food can be traced to matters of personal taste and preference or the competence of the cook. We have had just as many whites complain about the food as we have had nonwhites complain.

95. We have ordered special food for the nonresident cannery worker mess halls in accordance with the wishes of the Local 37 union leaders, the Local 37 cannery worker foreman, and the Local 37 cook or steward.

96. We have not imposed any dissimilar budgetary or other restrictions on the quality, quantity, or type of food which may be ordered or served by the cooks in any of the mess halls in any of our facilities.

97. Our policy on messing is to permit the cook at each facility to order and provide what he reasonably wants. While the general quality of food for all employees as well as the quantity is well above what most of us would eat in our own homes, complaints about food have probably existed over the years in almost all of our facilities and aboard our tenders. If the employees in a particular mess do not like the food, they will go to the cook. If the cook for some reasons determines not to provide steak once a week, it is because of his decision, not that of management and he may be persuaded

by those that he feeds during the season to make adjustments.

98. Throughout the entire case period and by contract, Local 37 has their own culinary department. By tradition as well as by preference the Local 37 cooks will order a number of supplies such as bean sprouts, soy, canned abalone, and rice, and yet may often be designated as "Oriental food" in the paperwork. Indeed, it is Oriental food that is cooked.

99. The mess facilities may differ slightly between the Local 37 and the AFU department, but they are the same essentially. If the AFU has additional equipment it is for the reason that that department is required to serve more personnel or such as at Red Salmon and Alitak bake for the entire camp.

100. At Alitak the main mess hall is called the Winter Mess because when crab

are processed at Alitak during the wintertime all personnel eat in the same mess hall. Local 37 has never exercised jurisdiction at the Ekuk cannery and Ekuk has not had a separate mess for cannery workers.

\* \* \*

[p. 1141]

105. For the tender fleet it is our policy, and we feel it is reasonable, to allow the tender captains some discretion in choosing crew as this work involves living and working for extended periods of time in close quarters, and sometimes long hours under arduous conditions at sea.

106. We feel that it is reasonable to hire applicants whose qualifications are known or who are recommended considering the facts of cannery operation. In addition, many jobs require an ability to get along with



others. All jobs require sobriety. Personal recommendations tend to weed out troublemakers in this regard. To do otherwise would risk setting problem personnel in a remote location where they are hard to replace.

107. We often hire additional cannery workers from the communities near the cannery during the season as the salmon catch impacts the demand for employees as there may not be time to look elsewhere.

108. It is necessary to hire beachmen, machinists, tender crews, carpenters and office personnel early in the season and prior to the time when cannery workers are hired, since they go to Alaska a month to six weeks before canning commences.

\* \* \*

[pp. 1141-1142]

109. Only in Bristol Bay, Alaska, were there "company" or employee fishermen.

110. At Red Salmon and Bumble Bee during the case period many of the nonwhite fishermen have chosen to become independent fishermen. Most resident Alaskans in Bristol Bay who wanted to fish, including most of our nonwhite fishermen preferred to fish on the Nushagak River because of its greater reliability in fish runs and somewhat longer season. By selecting the Nushagak, they would not be available for company fishermen jobs on the Naknek at Red Salmon and Bumble Bee.

111. The "east side" of Bristol Bay is where Bumble Bee and Red Salmon are located. For more than 15 years these canneries operated in consolidation with each other and with the CWF fish camp at

Egegik. This was called the Naknek-Kvichak Joint Operating Agreement. Under its terms, we split the pack 30% to Wards Cove, 30% to Bumble Bee, and 40% to CWF. At Egegik we had about 17 Alaska Native company fishermen until 1973. They were housed and fed with the white fishermen. They also had the privilege of using Red Salmon and Bumble Bee cannery facilities on the Naknek. For accounting purposes they were regarded as Red Salmon fishermen. They were recruited primarily by my father, A. W. Brindle.

112. By 1974 we had no company fishermen left on the payroll. They were phased out because accounting studies showed that after payment of run money, room and board, and transportation, they were more costly than independent fishermen.

113. We felt it reasonable to allow company fishermen complete latitude in

hiring a boat puller since the two must live and work together in cramped quarters and are paid on a share basis. We did not view the crew as consisting of a boss and an underling; rather they were viewed as partners and they each received an equal share in the catch.

114. If a boat puller wanted his own boat and had a good recommendation from his skipper, he might have been given a boat.

\* \* \*

[pp. 1142-1143]

115. There is no doubt that the Filipinos refer to themselves as Filipinos and, over the years in labor negotiations particularly, the union negotiators have taken great pride in the fact that the Filipino crews at the canneries are the best fish house crews that there are.

116. There has been considerable difficulty in getting over the term "Filipino bunkhouse." I can recall telling our affirmative action director, Salvatore del Fierro that perhaps we should avoid the term. Nevertheless he continued to use the term more often than not when referring to the Local 37 bunkhouse. The same is true of "Filipino crew" even though there are whites on it or even if the foreman is Chinese (Fred Wong).

117. Insofar as Alaska Natives are concerned, for mere ease or habit of identification they might be referred to as the Native crew. After all, they are Alaska Natives and proud of it. There are many organizations bearing the name "native," i.e., Alaska Native Co-Operative Association, Bristol Bay Native Association, Bristol Bay Native Corporation, etc. There are also

constant references to natives in Alaska as "Native Claim Act," "native rights," "native villages." One would normally assume, if you recruited from a Native or Eskimo village, the people who came from there would be Natives or Eskimos and they would often be referred to in that manner just as the Norwegian fishermen are referred to as Norwegians, Yugoslavians who are prominent in purse seining as "Slavonians," and Italians who are prominent in gillnetting as "Italians." The people from Manekotok, Unalakleet, etc., are almost entirely Eskimos and one would tend to call them such. Such labeling has never been used by our companies in either a derogatory or restrictive sense.

\* \* \*

[p. 1143]

118. Insofar as hiring relatives is concerned, there is no doubt that they



have better information as to what jobs are available and what the conditions at a particular cannery might be. Most of the jobs given to relatives are unskilled and very often are cannery worker jobs.

119. Other factors which make hiring relatives a reasonable business practice would include that sometimes it is the incentive to get the relative back to Alaska or it is part of an economic package which makes working for our company more attractive.

\* \* \*

[pp. 1144-1145]

123. . . . It would be extremely poor practice to try and run a tender with an experienced captain and an inexperienced crew. In the first place, you cannot expect the captain to be on the wheel all of the time. We lost a tender year before last because the captain had to lay down after a 24-hour storm and

while he was asleep the mate, whose qualifications we later found were suspect, managed to fall asleep and his vessel ran into a rock in open water. In the second place, the captain cannot be at the wheel and oil and grease the engine at the same time, nor in the case of an emergency, if you have an inexperienced crew, can you expect anybody to do anything since they don't know what to do. Obviously there have been situations where we have tried to get by with a crew with minimum requirements, but we normally would limit the use of the tender to make sure it wasn't used beyond the capabilities of the crew. For example, the tender VANGUARD is owned and maintained in yacht like condition by my uncle Joe Brindle. He spends a good part of each winter maintaining it and it is used only on short runs out of Wards Cove, Ketchikan. When witnesses Bird,

Milholland, and Chris Steele were on the VANGUARD as engineers they were on a tender not typical of the rest of our operation. We certainly could not do this on most of our other tenders.

\* \* \*

[p. 1146]

128. It is essential to have an experienced crew in the machinist department. There is absolutely no way you can even come close to running a cannery with a totally inexperienced, unskilled crew even if they were working under the close supervision of a first machinist and a cannery foreman. We are processing food in these facilities and they are going into sealed containers and packed under regulations promulgated by the Food and Drug Administration. With an inexperienced crew, you would either have to restrict your production or you would wind up with a lot of questionable pack

that would have to be reexamined or even destroyed and this is very expensive.

\* \* \*

[pp. 1147-1148]

138. While we do ship equipment south for major overhaul, major breakdowns can occur during the season. In one instance in 1977, when we had a heavy fishing season in southeastern Alaska, we had a clinching machine go wrong at Wards Cove. We had to borrow a clincher from a competitor since we could not get our fixed even with the assistance of the American Can Company man. The can shop equipment is leased from the can company. While they try to get by and make preseason adjustments and get out to help when you have a problem, their resources are limited and they have no control over weather or airplanes so they are not available "on call" as plaintiffs contend (Plaintiffs' Contention No. 120).

139. As an example, in 1977 at Wards Cove a lid got upside down in the seamer in the reform shop. We were fortunate to have two very qualified machinists (Landry and Mullis) there who were able to tear down the machine (it took all night) and repair it. The American Can man was not available. If we had not been able to fix it, our production would have been cut in half.

140. A port engineer has to understand marine diesels and they can be quite different from automobile engines. Marine equipment has problems different from regular automotive equipment. The port engineer should understand hydraulics. For example, he must know how to take an engine that has been swamped with salt water and get it running again. He really should have very good diesel mechanic experience since most of the engines in gillnet boats and seine

skiffs, as well as tenders and seine boats, are diesels. The port engineer has, however, so much total responsibility that we must rely on our tender engineers for most of the tender repairs. For example, at Ekuk, the port engineer has about 96 gillnet boats to keep running. Although the fishermen are independent, it is essential that we keep their boats running to keep their loyalty and to maintain their supply of fish. If an independent fisherman loses a day of fishing because of an engine breakdown it could cost him \$10,000 or more. Ekuk, Bumble Bee, Red Salmon, Chignik, Kenai, Egegik, and Alitak all store and winterize fishing boats under the port engineer's supervision.

\* \* \*

[pp. 1148-1149]

141. Quality control is really a function of definition. It depends upon



what each individual superintendent expects out of his quality control person. If they expect that person to check out the work of the salmon cook and do part of the seam check, then they should have two season's experience working under the machinist foreman. I can think of a bad quality control situation a couple of years ago when we had to recheck several days' canning of half pound cans because of a seam defect discovered by the Food and Drug Administration. It was never satisfactorily explained just who was supposed to be doing seam checks, but it cost about \$40,000 to have that portion of the pack re-examined at the Port of Bellingham.

\* \* \*

[p. 1149]

142. The work required of this crew varies from unskilled such as simply

unloading fish from the tenders to highly skilled, such as pile driving. Pile driving involves working with very heavy gear and mistakes can be fatal. Our crews have driven piling in various canneries. Other work of the beachgang involves launching boats, driving forklifts, and other heavy work around the cannery.

143. The beachgang is required to do a variety of skilled jobs. Welding, pipefitting, carpentry, and rigging skills must be all possessed by the beachgang as a collective unit. Just moving heavy equipment like oil or water tanks is skilled if you are going to do it without injuring someone. Most of this skilled work is done during the preseason or in the fall so the cannery workers are not exposed to it. They probably regard the beachgang as people whose only job [sic] is to unload fish.

\* \* \*

[p. 1149]

144. Of the five class facilities, four have had members of the Brindle family as superintendents: Harold at Red Salmon and Kenai (my father, A. W., until 1977 at Red Salmon), Greg at Wards Cove (my uncle Joe Brindle up until 1979), and my brother Winn at Alitak. At Ekuk, Jim Ekern was superintendent for many years prior to the formation of Columbia Wards Fisheries, and continued in that job.

\* \* \*

[p. 1149]

145. This depends on the size of the operation. The office manager or head bookkeeper's job requires more than a high school course in bookkeeping. In our operation, they are responsible for keeping track of records such as at Ekuk, 300 people, together with what is being bought and sold in the store and consumed in the mess house. At Ekuk, for instance,

the store is almost a year-round operation. The storekeeper must run the store like a business.

146. These personnel have to understand what keeping books is all about and they also have to understand what a cannery is all about because they are doing many different tasks. They are buying millions of dollars worth of fish and they are buying hundreds of thousands of dollars worth of equipment. We advance hundreds of thousands of dollars to fishermen and we advance money to employees. People have to understand how the union contracts work and what our responsibilities and our rights are under the contract. They have got to understand when to pay bills and when not to pay them and how to charge for personnel's time, such as port engineer's time on a fisherman's account, what it is charged to and whether it charged to, the boat or

to a tender.' They also have to calculate both state and federal taxes.

147. Bookkeeping personnel also have to keep track of the daily canning records and how many pounds of raw fish came out as cans today compared with yesterday.

\* \* \*

[p. 1312]

BY MR. ARDITI:

Q. Mr. Brindle, you are an attorney by training, is that correct?

A. That is my formal education, yes.

Q. And, you formerly appeared as an attorney for the defendants in this case, did you not?

A. That is correct, I entered a Notice of Appearance.

Q. You had a role in formulating the defense in this case, I take it?

A. I don't know that I had a role in formulating the defense because I'm

not sure what you mean by that. I had a role in attempting to, in the early stages of the litigation, in attempting to comply with discovery and shortly after the initial discovery was under way, I had less and less other roles in the case.

Q. Let me ask you, is it true that pages 3 thru 28 of your affidavit are taken in large part almost verbatim from the defense contentions in the Pretrial Order?

A. I have to tell you, I haven't seen the defense contentions in the Pretrial Order that I recall. I couldn't tell you, but I can tell you this, I have read these, some of this is my language directly and some of it I have discussed all these matters with counsel, and they put the affidavits together. Now, these discussions have gone on over a number of years. I don't know whether they are in a pretrial, what you call call [sic]



contentions, I don't know because I have not seen those. If I have seen them, I don't recall seeing them.

\* \* \*

[p. 1315]

BY MR. ARDITI:

Q. This is in your handwriting?

A. It would appear to be my printing, yes.

Q. And would you please read the last three lines for us?

A. The last three lines?

Q. Yes.

A. "Got another phoney minority claim today from EEOC--it never ends"--exclamation point and my signature.

\* \* \*

[pp. 1319-1322]

Q. Now, you have worked as a tender deckhand at Wards Cove when you were younger, didn't you?

A. That is correct.

Q. And, how old were you--you were about 13 or 14 when you first took that job, is that right?

A. That is when I first started getting paid.

Q. And, as you were going to school you became a tender engineer for Wards Cove Packing Company?

A. That is correct.

Q. And in fact, by age 21 or 22, you became a tender captain, correct?

A. I was assigned the captain's responsibilities the year I worked in Bristol Bay when the Skipper on a brine tender got sick and they needed an experienced man to take his place, and the next most experienced fellow was the Skipper on the boat I was on, so he was assigned on the brine, and I was assigned to the skipper on the Penguin which was

the vessel, and then assigned the pilot around the river system.

Q. You were in law school at the time, were you not?

A. That is correct, well, no I wasn't, I was in Bristol Bay at the time, and this was the summer I was attending law school in the winter. Yes.

Q. That is what I meant, and you were about age 21 or 22.

A. Somewhere in that area.

Q. Now, you learned the captain's job through your prior experience as a deckhand, correct?

A. Well, now, that depends on what you mean "learned it as a deckhand". I certainly learned it while I was on the boat doing a deckhand's function, but in addition to that, why, of course, the skipper was teaching me navigation, he was teaching me boat handling which was teaching me the rules of the road, so

within the frame of time that I was being a deckhand, yes, I learned the skipper's job, but I didn't learn to be a skipper because of or by being a deckhand.

Q. You did not have any courses in navigation prior to the time you became a tender caption, [sic] did you?

A. No, I had no formal courses in navigation, only courses from the skipper.

Q. In fact, you had no formal training at all for the tender captain's job, did you?

A. That is correct. I had no formal schooling as such.

Q. While you worked on tenders for Wards Cove Packing Company, you flew up to Alaska rather than sail up with the crew on occasion, is that true?

A. Oh, on occasion, yes.

Q. And that is because you were a student in school at the time?

A. That is correct.

Q. Now, I--

A. Well, that wasn't because I was a student, whether I went North on a tender or came South on the tender depended upon how my school schedule fit with the tender schedule. The first time I went up and worked, I went up on a tender. When I was about 14.

Q. So if your school schedule did not permit you to said [sic] up, then--

A. Then I would fly.

Q. And you started at a later date, then, correct?

A. Yes.

Q. Now, is it fair to say that neither Wards Cove Packing Company nor Columbia Wards Fisheries have fixed experience criteria for hiring of the beach boss?

A. Fixed experience criteria, I don't think that is accurate.

Q. Okay, do you recall having your deposition taken on June 3, 1980?

A. Yes.

Q. And, do you recall being asked the following questions and answers as follows:

MR. FRYER: Page, counsel?

MR. ARDITI: Page 55.

BY MR. ARDITI:

Q. "There is no set criteria then for hiring of beach boss, is that right?"

A. "Well, a beach boss has to be able to run a crew and do the work a beachgang does, so he has to know what the things are, but that type of work comes in many forms."

Q. "You don't measure that with respect to specific types of experience, do you?"

A. "I don't know how you would."

Q. Do you recall being asked those questions and answering as follows?

A. Yes.



Q. Now, in hiring tender captains, you look for different kinds of experience depending on which boat you are hiring for, is that correct?

A. Yes.

Q. And the same is true of tender engineer?

A. Yes.

Q. And although to lesser degree, the same is also true of deckhand jobs, correct?

A. I think that is correct.

\* \* \*

[pp. 1326-1327]

Q. Okay. Could you turn to page 7 of your affidavit? At line 27 you use the term "Iron Chink", and based on your experience in the industry, is it your understanding that prior to mechanization in the industry, all the butchering of the salmon was done by hand?

A. Well, I guess prior to mechanization of butchering, the butchering was done by hand, there was no machine to do it.

Q. And that was done largely by Chinese workers?

A. That is my understanding, it was primarily a Chinese contract for labor and Japanese. Certainly, there were other Asians involved.

Q. And is it your understanding that the salmon butchering machine was named the "Iron Chink" because it replaced so many Chinese workers?

A. I don't know why the gentleman who invented the Iron Chink called it that. There are a great many stories.

Q. Is that one of the stories you have heard?

A. That is one, I suppose.

\* \* \*

[pp. 1327-1328]

Q. Now, could you turn to page 11 of your affidavit, and specifically to lines 20 to 27 where you talk about preference clause for the machinists?

A. Yes.

Q. And that quotation would have come from the 1970 collective bargaining agreement, wouldn't it?

A. Yes, I would think so.

Q. Now, in 1971, that clause changed to require that people asserting a rehire preference also had to sent [sic] a rehire card in to the union, didn't it?

A. I don't recall when the rehire card procedure was put in, but I know there is, and I think there is today, that same language in the machinist contract.

Q. So to assert a rehire preference, a machinist has to send the card in to both the union and the company?

A. That is the technical requirement of the contract, yes.

\* \* \*

[pp. 1331-1333]

Q. Could you turn to page 14, paragraph 53 of your affidavit. At line 23 thru 29 you describe certain things that Mr. Baruso does requesting how, or are you physically present when he does this--when he removes names from the list or examines the list?

A. I have been physically present in the dispatch hall?

Q. No, what I am asking you, are you present at the time Mr. Baruso examines this list and deletes from the list and adds to the list?

A. Well, let's put it this way, I have had discussions on the telephone with Mr. Baruso concerning some of the people that were on the list that were being deleted or about people he wanted to

put on the list. I have not been in his presence when this was done, and I should probably--when I say Baruso in line twenty-five and a half, that really shouldn't have been just limited to Mr. Baruso, it should have really stated, to be more accurate, the people who are responsible for running the union hall, Mr. Baruso was president of the union hall, so we just talk about it as being Mr. Baruso. He's one I have had conversations with over the phone.

Q. Okay, then he makes adjustments or he talks to you about other people who are entitled to first preference, is that right?

A. Mr. Baruso has discussed with me people that he wanted to put on the list for particular canneries, yes.

Q. Now, your understanding of the collective bargaining agreement is the

first, second and third preference, correct?

A. That is correct.

Q. And the third preference is for new hirees, is that correct?

A. I think that is my recollection. I can't recall all the preferences clauses, I think it is the third preference or the fourth preference is the applicant generally or mutually agreeable to the company. I can't remember which.

MR. ARDITI: Could the witness be handed a copy of say Exhibit A-2?

(The document was handed to the witness).

BY MR. ARDITI:

Q. Okay, in fact, the third preference goes to persons satisfactory to the company, doesn't it?

A. Well, it says "persons satisfactory to the company, including



but not limited to, union members or men recruited for employment by the union".

Q. But those hired do not have to be satisfactory to the company, correct?

A. Well, let's put it this way, if in lining up a crew, it has been our experience that if there was somebody that the union wanted to put on the crew, and unless we had some very specific objections to that individual, that it was in our best interest to accede to the expressed list of the union in that regard.

Q. And that would be in the same way that you might accede to a recommendation as a tender captain for a crew member, correct?

A. Not quite.

Q. You do retain authority under the collective bargaining agreement to various preferences.

A. Yes, the collective bargaining agreement gave us that power.

\* \* \*

[p. 1339]

Q. Pages 33 thru 37, you talk about job qualifications for certain jobs, correct?

A. Yes.

Q. You do not hire for those jobs, do you?

\* \* \*

[pp. 1352-1353]

THE COURT: Are you saying you can never recall an instance of taking a cannery worker and moving him into another job during the year, during the season I should say?

THE WITNESS: Not someone under the Local 37 jurisdiction. We have with other cannery workers that were under the resident jurisdiction, but we don't have the same kind of guarantee situation. The

other problem is just simply one of filling in the job that you have your resident cannery workers are there, and they're there because you need them to perform a function, and if you pulled one out, then you have to replace him, if you're going to have to replace him through Local 37, then we have another guarantee.

THE COURT: Well, you're not obligated to replace through Local 37, are you?

THE WITNESS: No, but often time it is very difficult to find the local people to fill in that job.

\* \* \*

[Dep., p. 2]

BY MR. ARDITI:

Q. Please state your name.

A. Alexander Winn Brindle.

Q. And what is your business address?

A. 88 East Hamlin Street; Seattle, Washington.

Q. What is your job title, please?

A. President of Wards Cove Packing Company.

Q. And how long have you held that job?

A. Since approximately September of 1977.

Q. Do you have any jobs with Columbia-Wards Fisheries?

A. I am an officer of Columbia-Wards Fisheries, Inc.

\* \* \*

[Dep., p. 5]

Q. There is no set criteria, then, for hiring a beach boss; is that right?

A. Well, a beach boss has to be able to run a crew and do the work that the beach gang does, so he has to know what those things are. But that type of work comes in many forms.

Q. But you don't measure that with respect to specific types of experience, do you?

A. Well, I don't know how you would.

\* \* \*

[Dep., p. 57]

Q. What specific experience do you look for?

A. For who?

Q. A tender captain.

A. On which boat, in which area?

Q. It varies from boat to boat?

A. Certainly.

Q. Is that true of tender engineer as well?

A. Certainly.

Q. Tender deck hand?

A. Less.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF WARNER LEONARDO

\* \* \*

[1509-1510]

Q. Mr. Leonardo, I have a couple of questions--did you do the hiring for the jobs at Bumble Bee - South Naknek outside the classification of cannery worker, did you do that hiring yourself?

A. Yes, I did.

Q. For those jobs, did you generally make it a practice to interview applicants yourself?

A. Yes, I did.

Q. And this would include people like machinists and tendermen?

A. Right.

Q. Could you tell the court the types of questions you customarily would ask of people who wanted, let's say a tender engineer's job?



A. Well, I would ask him if he had any experience on boats before and if he knew anything about the particular type of diesel engines that we were using and if he had any tools--

Q. What kinds of qualifications did you impose for the job of, let's say, tender deckhand?

A. Well, I tried to get some young people that were--that had experience, in fact, I tried to get them out of Astoria because most of the kids had been on boats [sic] before with their fathers or with somebody, and knew how to tie up a boat, and ship, whatever it might be, and it is better than hiring a greenhorn.

Q. Mr. Leonardo, I am going to ask you to assume that an expert witness testified in this case that a cannery such as Bumble Bee could be properly operated with the machinist foreman, a first machinist, and the remainder of the

machinist crew being composed of machinist helpers. Now, just assume that as a fact, would you agree that Bumble Bee - South Naknek could be operated with the machinist crew like that?

A. Absolutely no.

(pp. 1510)

\* \* \*

Q. Do you remember my question, Mr. Leonardo? What kind of qualifications did you require when you hired people at Bumble Bee - South Naknek for the machinist crew?

A. Well, it depends on what field he was going to be in, what part of the operation, why it would be the general question of how much experience he had and if he had tools and where he worked before and stuff of that nature.

Q. Did you ever hire any greenhorns on the machinist crew at Bumble Bee - South Naknek?

A. No, but I have hired some bummers.

\* \* \*

[pp. 1513-1514]

1. My name is Warner Leonardo and I reside at 23302 Northeast 237th, Battleground, Washington. From 1952 until 1980, I was the superintendent of the Bumble Bee cannery at South Naknek, Alaska. . . .

2. During my years as superintendent at South Naknek, I attempted to personally interview every applicant for a job at the cannery other than cannery workers who were hired through Local 37 or cannery workers hired in Alaska. Our policy throughout the case period was to select the best applicants possible for any skilled job, regardless of race. In my experience, a personal interview was usually necessary to find the best applicant. Once the season has

commenced in Alaska, I felt we could get burned if we did not have the most qualified person since replacements at that time are very difficult to come by.

\* \* \*

[p. 1514]

3. In the 1960's we always had a few Alaska Native fishermen. However, the Natives went independent early compared with the nonresident fishermen. Some of our company fishermen were older and did not want to make the cahnge [sic].

4. We tried to take our best fishermen and make them independent so they would be able to pay for their boats. Alaska Natives were among this group.

5. Our policy concerning hiring boat pullers was mainly to let the skipper hire his own partner. We felt that since they had to live together under difficult circumstances and share equally in the catch, the skipper had to find someone

that he could work closely with. If a skipper could not find a boat puller, I would pick a skipper off a relatively nonproductive boat and make him a puller. I would always take an experienced man. There were too many things to learn and it was too short a season. The season starts in the Naknek-Kvichak area on June 25 and is over on July 20. The peak of the season is from the 4th of July to the 10th of July when most of the fish are actually caught. This does not leave any time for training.

\* \* \*

[p. 1514]

6. For hiring in this position, I always wanted someone who was at least 200 pounds in weight, strong and could lift 150 pounds or better. Actually, I preferred loggers because they were used to working with wire rope and slings and moving heavy objects. I also looked for

backgrounds in other types of heavy work such as dock work, pile driving, wire splicing, longshoring, and things of that nature.

\* \* \*

[p. 1515]

8. For tender engineers I required that they should be able to handle tools and make minor repairs on the tenders and be available to fix fish boat engines on grounds. . . .

\* \* \*

[pp. 1515-1516]

11. We were the first company in Bristol Bay to employ Eskimos as cannery workers from the Bethel-Kuskokwim area. In the 1970 season, however, we had a very high rate of turnover. We found that many of the Ekimoes [sic] that we hired that year were not experienced (it was a very heavy fishing year in Bristol Bay), did not want to stay for the whole season, and



some even left before they went to work. We were stuck for the cost of flying them down from the Bethel area and for the cost of flying them home even though they did not work or [sic] all or only for a short period of time.

12. Following this experience, we decided not to hire from that area again. We did develop the practice of employing military personnel from the air force base as temporary cannery workers during periods of heavy production. They were a mix of all races.

\* \* \*

[p. 1516]

13. I could rarely get a local resident (Bristol Bay) to have anything to do with any job in the cannery. Once in a while someone would agree to take a tender to Egegik for me but most, if they did take a job like that, would only last a few days during the fishing season. On

the other hand, we frequently were able to get local residents to work as spring and fall laborers before and after the actual fishing season.

\* \* \*

[p. 1517]

17. Plaintiffs' Exhibit 348. The Native galley was referred to as such simply because the Natives ate there. Nothing derogatory was intended. . . .

\* \* \*

[p. 1517]

21. In about 1968, Local 37 objected to our plans to open one mess hall for all employees. They insisted on having their separate mess and customary style of food.

\* \* \*

#### CROSS EXAMINATION

[p. 1544]

BY MR. ARDITI:

Q. Mr. Leonardo, you recruited applicants for the machinist job by word-of-mouth is that correct?

A. Talked to them, yes.

A. And did you recruit applicants for beachgang jobs, also, by word-of-mouth?

A. Yes.

Q. And did you recruit applicants for quality control jobs also by word-of-mouth?

A. Yes.

Q. And, did you recruit applicants for AFU culinary also by word-of-mouth?

A. Yes.

\* \* \*

[pp. 1544-1548]

Q. Did you recruit by word-of-mouth for all jobs, Mr. Leonardo?

A. All but thirty-seven, I didn't, the foremen did that.

Q. So, the foremen recruited the Local 37 workers?

A. Yes.

Q. And, you recruited by word-of-mouth for all other jobs?

A. I think so, yes.

Q. Now, you also did some recruiting by correspondence, didn't you?

A. Some.

Q. And some by telephone?

A. Whatever, yeah.

Q. Now, you never posted a vacancy at the cannery, did you?

A. Never, what?

Q. Posted a job vacancy at the cannery?

A. No.

Q. And, you never advertised in a newspaper or radio for a job vacancy, did you?

A. No.

Q. And, in fact, it was your preference to hire people whom you recruited by word-of-mouth by telephone or by mail, wasn't it?

A. Yes.

Q. That is true for machinist jobs?

A. Yes.

Q. Beachgang jobs?

A. Yes.

Q. For quality control jobs?

A. Yes.

Q. And for all jobs besides cannery worker, is that correct?

A. Yes, sir.

Q. Now, you did not give any tests for applicants for employment, did you?

A. No.

Q. At Bumble Bee, you hired some tender cooks who did not have previous at-sea experience, didn't you?

A. Yes, I had.

Q. And you hired some deckhands who did not have previous sea experience?

A. Yes.

Q. And you also hired beachmen without previous experience, didn't you?

A. Yes.

Q. Now, is it fair to say that in your view, on the beachgang, all you needed was a beach boss plus one or two beachmen who know how to run wenches, launch scows and run cranes?

A. Yes, it was more to it than that, but --

Q. Now, in your affidavit, you mention that in hiring for beachgang jobs you wanted someone who was at least two hundred pounds in weight, is that correct?

A. That is a good figure.

Q. Do you know many Filipinos at the cannery who appear to be two hundred pounds in weight?



A. No.

Q. And most of those who appear to meet that requirement were white, is that correct?

A. Yes.

Q. Now, you did not require everyone you hired to fill out a written application, did you?

A. Well, most generally, I wouldn't -- I don't know.

Q. Mr. Leonardo, can you tell me how long there have been two mess halls at South Naknek?

A. Ever since I have been there.

Q. And how long is that?

A. Thirty-one years.

Q. And has one also been for cannery workers?

A. Yes.

Q. And the other has -- and has the other been for other employees?

A. Well, whatever. I had them both ways.

Q. How long at South Naknek have you housed cannery worker crews separate from other crews?

A. State that question again.

Q. To your knowledge, how long at South Naknek have cannery worker crews been housed separated from other crews?

A. Well, as long as I have been there.

Q. Now, beachmen work with the tides sometimes, don't they?

A. Yes.

Q. And that means they unload fish when the tide is in, is that correct?

A. Yes.

Q. And they are housed with carpenters, is that correct?

A. Yes.

Q. And carpenters prepare the docks when the tide is out, correct?

A. Yes.

Q. So, they get up at different times, is that correct?

A. I guess, yes.

Q. Now, are the culinary workers for Local 37 housed with the cannery workers?

A. I guess so, yes.

Q. Do the culinary workers have to get up earlier than the cannery workers to prepare breakfast?

A. Well, yes.

Q. Do the port engineers live with machinists?

A. Yes.

Q. The port engineers have to get up at odd hours, is that correct?

A. Yes.

Q. So their working times are not necessarily the same as the other machinists, is that correct?

A. I guess, yes.

\* \* \*

[1975 Dep., p. 3]

Q. You are currently employed by Bumble Bee Seafoods, a division of Castle & Cook?

A. Right.

Q. In what capacity?

A. Cannery superintendent.

\* \* \*

[1975 Dep., p. 20]

Q. Let me try to clarify the question a bit. You stated that your tendency is to prefer people whom you recruit by word of mouth, by telephone, or by mail because you know them or because somebody has recommended them. Right?

A. Yes.

Q. This would be true for machinists, right?

A. Yes.

Q. Would it be true for beachmen as well?

A. Yes.

Q. Would it be true for quality control?

A. Yes.

\* \* \*

[1975 Dep., p. 21]

Q. Aside from cannery workers, does this preference of people who have been recruited over people who have applied on a walk-in basis extend to all job classifications?

A. Yes.

\* \* \*

[1975 Dep., pp. 58-59]

Q. The beachmen unload fish, is that right?

A. Right.

Q. And when is their call-out time generally?

A. Well, at all hours, depending on the tides.

Q. They work with the tides then?

A. Yes.

Q. Now, the beachmen live with carpenters. Is that right?

A. Yes.

Q. The carpenters don't work with the tides, do they?

A. In some instances, yes.

Q. Why don't you state for the record what you mean by working with the tides?

A. If the carpenters were working on the dock for some reason or other, why they would have to wait for the tide to go out.

Q. How about with regard to beachmen?

A. Well, the beachmen have to operate when the tide is coming in or high or going out.

Q. Well, the boats come in when the tide is high, right?

A. Right.



Q. So they do unloading work when the tide is high, right?

A. Yes.

Q. That's the time when the carpenters can't work on the docks, right?

A. Yes, that's right.

Q. So all the unloading work that the beachmen do is done at different hours from the dock repair work that the carpenters do. Is that right?

A. Yes.

\* \* \*

[1975 Dep., p. 60]

Q. Now, when carpenters aren't working on the docks, they are working on the buildings or the boats. Right?

A. Yes.

Q. They are not working with the tides then, are they?

A. No.

\* \* \*

[1975 Dep., pp. 60-61]

Q. Port engineers don't work in operating the machinery inside the fish house or the canning house, do they?

A. No, not in our place.

Q. But they are machinists, right?

A. They are in the machinists contract.

Q. And they are housed with the rest of the machinists, right?

A. Yes.

\* \* \*

[1975 Dep., p. 63]

Q. So the salmon butchering machinists would work the same hours as the fish house cannery workers. Right? You would start them a half-hour early, right?

A. No, he probably would want to be on the job earlier because the plant is all electric; there are certain technical switches that he has to pull and put the

generator plants on the line and stuff, so he would come earlier than they would even.

\* \* \*

[1975 Dep., p. 64]

Q. But still, he would come at a different time from the machinists who worked the canning machines, right?

A. Yes.

Q. And that would be at a different time from the time the port engineers started work, right?

A. Well, port engineers are on a different schedule.

\* \* \*

[1975 Dep., pp. 65-66]

Q. The resident -- strike that. The resident cannery workers work the same hours as the non-resident cannery workers, right?

A. Yes.

Q. Yet they are housed separately. Is that right?

A. Yes.

Q. Where do the Local 37 culinary personnel reside? Do they reside in the Local 37 bunkhouse or elsewhere?

A. Yes.

Q. In the Local 37 bunkhouse?

A. Yes.

Q. Now, are the culinary workers hours the same as the cannery workers?

A. No.

\* \* \*

[1975 Dep., p. 73]

Q. Let me clarify again. At the start of the canning season, do people then move into those different bunkhouses or do they stay in the same bunkhouses they occupied in the pre-season period?

A. Some of them do.

Q. Some of them change bunkhouses?

A. Yes.

[1978 Dep., p. 2]

Q. Could you please state your full name for the record?

A. Warner Leonardo, W-a-r-n-e-r L-e-o-n-a-r-d-o.

Q. And are you still the cannery superintendent at the Bumble Bee Cannery?

A. Yes.

\* \* \*

[1978 Dep., p. 46]

Q. You don't have any written job qualifications at Bumble Bee, do you?

A. No.

Q. Have you ever had them?

A. No.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF DONALD E. WISE

[pp. 1688-89]

Q. Dr. Wise, would you refer to Exhibit A-278 and turn to the Wards Cove and Red Salmon tab, table four, which I believe is the same as table two in your affidavit.

A. Yes.

Q. So, now, were you the person who set up these statistical tests shown in this table?

A. Set them up may be a broad word.

Q. What was your involvement?

A. I have reviewed and designed and prepared and interpreted the results of these tests.

Q. Could you explain to the court the number in the machinists column on the same exhibit starting with BNML Critrow (phonetic) down through CMPS or composite



deviation row and explain how those are calculated using that job family?

\* \* \*

[p. 1695]

Q. So, in terms of determining whether or not the hiring of machinist job family at this particular group of canneries was within two composite standard deviations, if we look at CMPS-DEV, row, composite deviation row--

A. That is correct.

Q. If that is in excess of one point nine six positive, that would indicate that it's outside--well, it would be unusual to be outside of that, and still be by chance if it is less than that one nine six, they you're within the bounds of chance.

A. That's correct.

\* \* \*

[pp. 1714-1719]

11. I now turn to a line-by line explanation of the tables contained in Exhibit A278. For illustration purposes I have used the table that contains data on "new seasonal" hires at the Wards Cove and Red Salmon canneries for the years 1971 through 1980. Ex. A278, Tab: "WC & RS," Table 4. [Note: This table is included in the Excerpt of Record.] The relevant labor market target percentage for white workers is computed using a geographical weighting based on the "relevant seasonal labor force," with the weighting being based on the section of job.<sup>[1]</sup> The exact procedures for computing the target percentage of white workers are described in detail in Dr. William Price, Jr.'s and Dr. Rees' affidavits.

---

1. The weighting used for each job family is indicated by the last line in the table, labeled WEIGHTING.

12. The columns in the table show the results for each of the job families at the canneries.<sup>[1]</sup> The specific job titles represented in each job family are detailed in Dr. Price's affidavit. The last three columns of the table are aggregates of the other columns. For example, the column labeled AT ISSUE refers to the composite results for the twelve at issue job families, i.e., all except CANNERY and LABORER.

13. The first row in the table, labeled HIRES shows the total number of new seasonal hires for this cannery group and job family for the years 1971 and 1980. The table indicates that there were 211 new seasonal hires in general skill jobs during 1971 through 1980 at Wards Cove and Red Salmon combined. There were

---

1. This table is organized by job families. We have also prepared tables organized by departments. In general, the comments I make here apply equally to those tables organized by department.

709 new seasonal hires in the at issue families, and a total of 2,047 new seasonal hires for all jobs at these canneries.

14. The second row of the table, labeled ACT %, gives the percent of these new seasonal hires who were white. For the general skills jobs, this was 73.460%, i.e., 155 out of the 211 new seasonal hires in the general skill jobs were white.

15. The third row of the table, labeled TARGET, indicates the percent of the relevant labor force who are white. This value is calculated using the geographical weighting scheme mentioned above and discussed by Dr. Rees' and Dr. Price's Affidavits.

16. The remainder of the table deals with the issue of how close the "actual" is to the "target". This issue is central to the question of whether the

hiring pattern at the canneries is discriminatory. The classical statistical approach to this question is to ask "Are the observed data so different from what are expected from a random selection (i.e., race blind) process, that we must conclude that the process is not random?" If so, we must look for other explanations, one of which might be race discrimination.

17. There are two primary reasons that the "actual" and "target" will seldom be the same. First, the canneries hire only a small percentage of the "relevant labor force" and, therefore, there is sampling variation in the hiring process. Second, detailed census data on occupation and industry are only available for a sample of the population and, therefore, there is sampling variation in any census-based estimate of the "relevant labor force." Both of these

sources of sampling error need to be considered in any comparison of hiring patterns at the canneries to the "relevant labor force."

18. The next to last line in the example table, labeled CMPS DEV gives the results of our best comparison of the actual to the target hiring percentages for white workers at the Wards Cove Packing Co. canneries. This row indicates the number of "standard deviations" the actual hiring percentage differs from the target hiring percentage. These standard deviations measure the variation in the difference between the sample percentage and the true population percentage which can be attributed to chance variation. If the hiring process is random with respect to race, and if it were to be repeated a large number of times, we would expect the actual hiring percentage to be within



plus or minus 1.96 standard deviations of the target 95 percent of the time. This range of plus or minus 1.96 standard deviations from the target percentage contains what is known as a 95 percent confidence interval. Values falling within the range of the confidence interval are consistent with the hypothesis that hiring can be represented by a random process, i.e., a race blind process. Furthermore, values of 1.96 or greater indicate that substantially more white employees than expected were hired, while values less than -1.96 indicate that substantially fewer white employees were hired than expected.

19. Inspection of the last row of the table indicates only one column where the value for CMPS DEV exceeds 1.96. The value for TENDER is 2.230 standard deviations, indicating that the percentage of whites in the TENDER group

exceeds the expected value by a statistically significant amount.

20. What conclusions can be drawn from these findings? There are two possible explanations. The first is that the canneries have not hired TENDER's in a manner consistent with a random selection process and, therefore, some other explanation must be found for the hiring pattern observed at Wards Cove Packing Co.--for example, race discrimination or perhaps skill requirements that we have not adequately incorporated in our estimates of the relevant labor force. The second possible explanation is that the hiring process is race blind, but that we observed an unusual situation, e.g., that Wards Cove had an unusual and unrepresentative set of applicants to hire from. In fact, the consequence of the statistical nature of the test insures that approximately once in each

twenty times we apply this test we should expect to find values of CMPS DEV that exceed 1.96, even if the hiring process is an absolutely random process. Since the proper interpretation of the statistical results is crucial to an understanding of this case I will return to this subject later.

\* \* \*

[pp. 1851-1852]

BY MR. ARDITI:

Q. I suppose what we have established at this point is that when we find one point nine six for larger standard deviations, and the composite deviation row, then we have a statistically significant overrepresentation for a statistically unrepresentation of non-whites, is that correct?

A. Yes, that would be correct.

Q. Now, when in the same row we find minus one point nine six or more standard deviation, it means that we have a statistically significant overrepresentation of non-whites, is this correct?

A. That is correct.

Q. And, I realize that there is a proper way to phrase this from a statistician's point of view and an improper way, but if it's one point nine six standard deviations, what we are really seeing there is a suspicion of discrimination against non-whites, correct?

A. I think that you are seeing there is evidence that you don't have random selection from a target of pool with that particular target as to whether or not that is discrimination or not is a different issue.

Q. Okay, but when we find a plus sign there we are talking of over-representation of whites, correct?

A. That is correct.

Q. And, when we find a minus, we are talking under-representation of whites, correct?

A. That is correct.

Q. Now, one interpretation or one possibility of finding a great deal of minus signs with one point nine six standard deviations or less, saying going down to minus three or whatever, is that the availability figure that you selected is wrong, isn't that one interpretation of it?

A. That would be one, yes.

\* \* \*

[p. 1853]

Q. Alright, let me give you an example. Let's say that in hiring Alaska residents, an employer hires primarily

from Alaska native villages, okay, rather than in an even way from the state as a whole, okay?

A. Alright.

Q. And Alaskan native villages are more heavily non-white than as the state as a whole, isn't that correct?

A. I assume.

Q. And the smallest breakdown that you have on one in one hundred public use sample for Alaska is statewide, correct?

A. That is correct.

Q. So, if an employer is actually hiring and actually, or actually get applicants from the native villages rather throughout the state as a whole, use op [sic] the one in one hundred public use tape is going to under estimate the percentage of non-whites, isn't it?

\* \* \*



DISTRICT COURT

TESTIMONY OF DR. ALBERT REES

[pp. 1865-1884]

ALBERT REES, being first duly sworn,  
on oath deposes and says:

\* \* \*

1. Let me begin by stating my qualifications to be an expert witness in this case. I received the Ph.D. in Economics from the University of Chicago in 1950. I have been Professor of Economics at the University of Chicago and at Princeton University and for many years taught undergraduate and graduate courses in labor economics at both these institutions. I also supervised a large number of doctoral dissertations in labor economics at both institutions. I am the author of three books in labor economics and the coauthor of a fourth; two of these books deal in part with racial

discrimination in labor markets. I have also had many articles published in leading journals, including the American Economic Review, the Journal of Political Economy, the Industrial and Labor Relations Review, the Journal of Human Resources, and the Monthly Labor Review. A full list of my publications is attached to this affidavit.

2. The plaintiffs in this case allege that the defendants engage in racial discrimination against nonwhites in hiring employees for certain seasonal jobs in five of defendants' facilities in Alaska (these will be referred to as "class facilities"). The way in which such allegations are ordinarily judged is to compare the percentage of nonwhites hired by defendants in the jobs at-issue with the percentage of nonwhites in the supply of labor qualified for and potentially available to do the work in

question. For most manual jobs, including skilled manual jobs, the ordinary procedure for estimating the percentage of nonwhites in the labor force would be to examine the racial composition of the qualified labor force living within reasonable commuting distance of the place of employment. For some professional jobs, one might examine the racial composition of the regional or national pool of people qualified for the job.

3. This case presents special difficulties that render the usual procedures inapplicable because most of defendants' seasonal employees do not live within the commuting distance of defendants' facilities. Many are hired in the lower 48 states, largely from the states of Washington and Oregon, and are transported at the employer's expense to Alaska (generally from Seattle) for the

summer packing season. Other seasonal employees are hired from remote Alaskan villages and transported within Alaska to defendants' facilities. While at the defendants' facilities, migrant workers live in bunkhouses or apartments provided by their employers.

4. To deal with this difficulty, I have devised a special procedure to estimate the racial composition of the available labor force in the geographical areas from which the defendants hire. This procedure has been carried out under my general direction by Dr. William G. Price, Jr., and his associates.

5. The basic data source used in this procedure is the one-in-one-hundred Public Use Sample of the United States Census of Population and Housing for 1970. This data source makes available on computer tapes the detailed individual records of age, sex, race, labor force

status, industry, and occupation of a 1% sample of the population. The smallest geographical areas by which these data are classified is the county group; a county group must have a population of 250,000 or more. In densely populated areas, a county group may be a single county; in sparsely populated areas, it may be a whole state. Thus, King, Snohomish, and Pierce Counties, Washington, each constitute an entire county group (Nos. 13501; 13502; and 13503). The whole state of Alaska is county group 14801.

6. The first step in the estimation procedure is to examine the defendants' employee records for those who worked at any of defendants' Alaska facilities (except Icy Cape) in each of the years 1971-1980. From these records we determine each employee's race and place of residence at the time of hire.

These places of residence for the whole ten-year period are then grouped into the county groups used by the Census. This process permits us to derive weights to be applied to the Census data in which the weight given to each county group is proportional to its importance in providing the employees actually employed by defendants in the years 1971-1980. These weights can be derived for all hires or for new hires, and can be derived separately for particular facilities or for particular occupations. In each instance, the weights provide accurate estimates of the geographical sources of defendants' labor supply.

7. In estimating labor supply for particular departments or job families at defendants' facilities, we may use Census data either for the labor force as a whole or for parts of the labor force comprising occupations which involve skills relevant



to particular job families. In my opinion, the latter method, indicated by the phrase "Skilled Workers," provides the better basis of comparison for defendants' hiring into the skilled job families. However, for the "General Skills" job family, and for comparisons by department (without skill differentiation), references to the Census of the whole labor force ("All Workers") is appropriate.

8. The more difficult part of the procedure is to estimate which individuals in these geographical areas are available for seasonal work. None of the data in the Census tapes provide definitive information on this, nor would any other statistical data source. The Census data, however, can be used to identify the classes of workers most likely to be available for migrant seasonal employment.

9. In some versions of the procedure, I have assumed that workers with full-time year-round employment would not be willing to leave this employment to take seasonal work even where the seasonal work is very well paid. This leaves several different categories of workers available: the unemployed; students and teachers who are free to work during summer; and workers in other seasonal industries whose seasons do not necessarily coincide with the salmon packing season. In addition, there are workers in industries such as construction who are not usually employed steadily by any one employer. The sum of these categories is the availability class called "Relevant Seasonal."

10. As an alternative assumption, we have used the availability class of everyone in the civilian labor force aged 18 and above. From either of these

availability classes the employer would select those applicants best qualified by skill and experience to fill the vacancies not filled by returning workers from previous seasons.

11. In my judgment, the availability class "Relevant Seasonal" reflects the composition of defendants' work force more accurately than the class "Everyone in Work Force." The two assumptions, however, give roughly similar results so that the choice between them is usually not crucial.

12. We use these skill and availability considerations to extract from the Census data our best estimates of the racial composition of the labor supply available to the various jobs in Alaska salmon canning industry. In doing this, we do not claim to identify those particular individuals in the Census sample who are, in fact, willing and able

to work in the industry. It is certainly true, for example, that not all college students are willing to work in Alaska. However, the best independent estimate we have of the racial composition of those college students who would be willing and able to work in Alaska is the racial composition of college students reported in the Census.

13. The same argument applies to our procedures for estimating the racial composition of the labor force for any of the at-issue jobs. For example, the Census does not identify each of the cannery machinist jobs as an occupation. Nonetheless, the best available estimate of the racial composition of persons qualified to be cannery machinists is the racial composition of those workers in the Census sample reporting occupations most similar to those in the machinist job family. Based on Mr. DeFrance's

information, this would be those workers who reported their occupations as those in the machinist job family, Attachment 8 to Dr. Price's affidavit. We cannot infer from this that all workers in these occupations could be cannery machinists, nor that all cannery machinists would report one of these as their occupation group. We simply use these classifications to construct our best estimate of the racial composition of people available to be cannery machinists.

14. A final comment on the use of the Census is that the month of the year the Census was taken is not particularly important to the validity of our study. Our purpose is to estimate the racial composition of the relevant labor force. Since most workers do not change occupations on a seasonal basis, the date of the Census enumeration should have

little effect on the distribution of sampled individuals across the occupational categories.

15. In some versions of this procedure the geographical patterns are based on "all hires" or "all seasonal hires;" in other versions the pattern is based on "new hires" or "new seasonal hires." The word "seasonal" indicates that we have omitted employees who work in defendants' facilities in the lower 48 states--the home offices of Wards Cove Packing and of Columbia Wards Fisheries and the Lake Union Terminals. These workers are employed by defendants during the season when the Alaska canneries do not operate, and are therefore not strictly migrant seasonal employees. The difference between "all hires" and "new hires" is that in "new hires" each individual is counted only if he did not work in the same facility on the same job



in the previous season, while in "all hires" each employee is counted once for every season in which he is employed, even when he returns to the same job at the same facility.

16. Defendants are generally required by the terms of their union contracts to rehire union employees from the previous season who make a timely written request to be rehired. In any event, defendants would want to rehire a satisfactory employee, particularly in a skilled job, rather than take a chance on an unknown applicant. For this reason, versions of the analysis based on "new hires" are preferable to those based on "all hires." If there is any racial discrimination, it would be reflected in the initial hiring decisions, which are the only decisions where the defendant employers always exercise free choice. The "all hires" versions of the procedure

also suffer because the multiple counting of the same individual, which overstates the number of hiring choices open to the employer, can make random events appear incorrectly to be statistically significant.

17. The procedure we have devised can be applied to all the workers in a department or only to the skilled workers. In the tables for "skilled workers" (e.g., Exhibit A-278, Table 4 for each tab), the unskilled and hard-to-classify jobs in each department have been removed and listed in a separate column headed "general skills." The remaining job families contain most of the highly skilled, well paid jobs that are the main subject of contention in this litigation.

18. Furthermore, the procedures can use geographic weighting patterns (for the Census data) based only on particular

jobs, based on the section of the job (cannery workers and laborers are one section, other employees are the other), or based on the entire cannery workforce. Of these three possibilities, the second seems strongly preferable. Weighting by individual jobs results in samples that are too small to produce reliable weights. A few individuals in the same job hired from the same county group can greatly inflate the relative importance of that group. At the opposite extreme, using the entire workforce ignores some important differences between the geographical origins of cannery workers and laborers on the one hand and the remaining workers on the other. In particular, this version of the procedure overweights Alaska, which provides a larger portion of cannery workers and laborers than of more skilled workers. Since the cannery worker jobs are not at-

issue in this litigation, this seems inappropriate. Weighting by section is appropriate because almost all the workers other than cannery workers and laborers are hired at company headquarters, whereas most cannery workers and laborers are not.

19. The Census data gives the race of each individual in the Census sample. By following the procedures summarized above, we have estimated the percentage of nonwhites in the labor supply of seasonal workers as defined by the various geographical weights and availability classes I have described. We then compare the estimated percentage of nonwhites in the labor supply with the percentage of nonwhites actually hired by defendants. Where these percentages differ, as they ordinarily do, we use standard statistical tests to determine whether or not the differences are small

enough to lead one to presume that they could have occurred by chance. The results of these comparisons and tests of statistical significance are given in Exhibits A-278 ("new seasonal hires") and A-279 ("new hires").

20. The general conclusion I would draw from these exhibits is that there is not a pattern or practice of racial discrimination in hiring skilled workers for defendants' facilities. In many job families the percentage of nonwhites hired is larger than their percentage of the relevant labor supply. In many more job families, nonwhites are slightly under-represented, but the differences are not statistically significant and could have occurred by chance with a high probability. In a few job families of the class facilities of two of the defendant companies, nonwhites are under-represented in comparison with the labor

force estimates, and the differences are significant at the 5% level. Racial discrimination is one possible explanation of such differences.

21. The procedures used are more reliable when applied to groups of facilities rather than to individual facilities. In the individual facilities the sample size can be so small that even relatively large disparities between the percentage of nonwhites hired and the percentage of nonwhites in the labor force would not be statistically significant.

22. For the defendant Wards Cove Packing Company, the table that in my judgment best enables one to test the allegation of racial discrimination is the one entitled "New Seasonal Hires, Wards Cove Packing Company (Wards Cove and Red Salmon) for Skilled Workers Weighted by Section of Job for



Availability Class Relevant Seasonal." (Exhibit A-278, Tab: WC&RS, Table 4). This table shows 709 hires in the jobs at-issue in this litigation. Of these 709 workers hired, 85.3% were white. The percentage of whites in the labor supply for these jobs is estimated as 89.9%, which is listed on the line labeled "target." Thus, in general, Wards Cove Packing Company hired a larger percentage of nonwhites in the jobs at-issue than the 1970 percentage of nonwhites in the relevant seasonal labor force of the geographical areas from which they draw employees, when these geographical areas are combined with weights representing the area of origin of workers in all jobs at-issue in all Alaska facilities (except Icy Cape) of the three defendant companies.

23. When we examine the columns of this table, which represent job families,

separately, we find four in which the percentage of whites hired was greater than the percentage of whites in the labor supply. These job families are carpenter, fisherman, medical, and tender. We now examine the row labeled "composite deviation" to determine whether these differences are statistically significant at the 5% level, given the sampling errors inherent in the process of hiring from a pool of applicants and the 1% sampling of the Census. This row tells us that in three of the four cases the differences could have occurred by chance (the composite deviation is less than 1.96, the critical level). In the remaining case, the tender job family, the result would occur by chance less than one time in twenty. I conclude that nonwhites are significantly under-represented in hiring in the tender

job family, which could be the result of racial discrimination.

24. It might be argued that the two class facilities of Wards Cove Packing Company should be examined separately, to the extent different individuals do the hiring at the two facilities. If we examine the table for new seasonal hires of skilled workers at the Wards Cove cannery alone (Exhibit A-278, Tab: WC, Table 4), we find 318 hires in the jobs at-issue, of which 89.623 percent were white. The estimated percentage of whites in the available labor supply is (weighted by section) 89.949 percent, so that in general, nonwhites are not under-represented. Nonwhites are under-represented in four job families: fisherman, machinist, office, and tender, but in none of these cases is the difference statistically significant at the 5% level.

25. If we examine the corresponding table for the facility at Red Salmon (Exhibit A-278, Tab: RS, Table 4), we find 391 hires in the jobs at-issue. Of these 81.941% were white. The estimated percentage of whites in the labor supply is again 89.949%, so that in general, nonwhites are not under-represented in the jobs at-issue at Red Salmon. They are under-represented in five job families: carpenter, fisherman, medical, radio, and tender, but only in the tender job family is the difference statistically significant at the 5% level. In the tender job family the under-representation of nonwhites could be the result of racial discrimination.

26. If we examine the corresponding tables for the defendant Columbia Wards Fisheries (Alitak and Ekuk) (Exhibit A-278, Tab: CWF: AK&EK), we find 862 hires in the jobs at-issue at the two

facilities taken together. Of these 71.694% were white. The percentage of whites in the relevant seasonal labor supply is again estimated at 89.949%, so that for all the jobs at-issue taken together the percentage of nonwhites hired substantially exceeds that in the labor supply. This is also true for each job family separately, except for "office" and "store and stockroom." In neither of these is the under-utilization of nonwhites statistically significant. I conclude that there is no evidence in this table to support the allegation that nonwhites are under represented in at-issue jobs at Columbia Wards Fisheries.

27. If we look at the corresponding tables for the two facilities separately, we obtain the same result. At Alitak (Exhibit A-278, Tab: AK, Table 4), only 67.333% of the workers hired in the jobs at-issue were white, substantially less

than the percentage in the available labor supply. Nonwhites were under-represented in two job families, fisherman and office, but in neither case is the difference statistically significant. At Ekuk (Exhibit A-278, Tab: EK, Table 4), 76.456% of the hires in jobs at-issue were white, again well below the percentage in the available labor supply. Nonwhites were under-represented in five job families: carpenter, culinary, machinist, medical, and storekeeper/stockroom, but none of these differences is statistically significant at the 5% level.

28. Next we examine the corresponding table for South Naknek (Exhibit A-278, Tab: SN, Table 4), the only class facility operated by defendant Castle & Cooke (Bumble Bee Seafoods). Here we find 536 hires in the jobs at-issue. Of these, 84.142% are white. The



percentage of whites in the relevant seasonal labor supply is again 89.949%. For at-issue jobs at South Naknek as a group, nonwhites are not under-utilized. Examining the separate job families, however, we find seven where the percentage of whites is greater than the target percentage. These are beachgang, carpenter, culinary, fisherman, machinist, store and stockroom, and tender. In two of these seven job families (fisherman and machinist) the differences are too large to have occurred by chance more than one time in twenty. I conclude that nonwhites were significantly under-represented in hiring in the fisherman and machinist job family at South Naknek, which could be the result of racial discrimination.

29. In considering whether the defendants engage in a pattern of discrimination based on race, it may be

useful to look at the data for all their facilities, and not merely at the "class facilities" at which discrimination is alleged by plaintiffs. This approach is especially relevant to the extent that defendants follow common hiring practices and policies at all facilities. It also results in larger sample sizes that increase the power of the statistical tests.

30. A broad view is obtained by looking at all Alaska facilities in which Wards Cove Packing Company has an interest, which combines Wards Cove Packing Company and Columbia Wards Fisheries (except Icy Cape). Exhibit A-278, Tab: WC: AL-IC, Table 4. For this group of facilities, we examine the table for new seasonal hires of skilled workers weighted by section of job. Id. There were 2,789 hires in this group, of which 74.722% were white. The percentage of

whites in the relevant seasonal labor supply was 89.949%, so that in this large set of hires, nonwhites were substantially over-represented. They were under-represented in only three small job families--administration, medical, and radio--with a total of only 27 hires. In none of these was the difference statistically significant at the 5% level.

31. The same kind of comparison can be made for another broad group of facilities, Castle & Cooke, Inc. interests, all Alaska facilities (except Icy Cape). Exhibit A-278, Tab: C&C Al-IC, Table 4. This overlaps the previous grouping of facilities because it also includes Columbia Wards Fisheries. For the Castle & Cooke interests, we look at skilled workers weighted by section of job family for the availability class "Relevant Seasonal." Id. In this

grouping there were 2,616 hires in the jobs at-issue, of which 73.777% were whites. The percentage of whites in the labor supply was again estimated at 89.949 percent, so that for these facilities as a group, nonwhites are not under-represented. They are under-represented in only two job families, administration and culinary, and in neither of these cases is the difference statistically significant at the 5% level.

32. In Table 1, I have summarized the results discussed so far for all at-issue workers by facility. In Table 2, I have summarized the results for the facilities in Table 1 which had job families where there are significant positive differences between the actual and target percentages of whites. (The source for both tables is Exhibit A-278, Table 4 for each Tab.) The remaining

facilities in Table 1 had no job families  
with a significant positive difference.



**Table 1**  
**Summary of Statistical Results for New Seasonal Hires,**  
**Skilled Workers Weighted by Section of Job Family**  
**Availability Class Relevant Seasonal;**  
**for All At-Issue Jobs**

<u>Facility or Group</u>	<u>No. of Hires At-Issue</u>	<u>Actual Percent White</u>	<u>Target Percent White</u>	<u>Composite Deviation</u>
Wards Cove	318	89.6	89.9	-0.17
Red Salmon	391	81.8	89.9	-4.58
Alitak	450	67.3	89.9	-13.46
Ekuk	412	76.5	89.9	-7.78
South Naknek	536	84.1	89.9	-3.67
Wards Cove Class Facilities	709	85.3	89.9	-3.20
Columbia Wards Class Facilities	862	71.7	89.9	-13.37
Wards Cove Interests Alaska Operations	2,789	74.7	89.9	-14.27
Castle & Cooke, Inc. Interests, Alaska Operations	2,616	73.8	89.9	-15.02

**Table 2**  
**Summary of Statistical Results for New Seasonal Hires,**  
**Skilled Workers Weighted by Section of Job Family,**  
**Availability Class Relevant Seasonal; by Job Family\***

<u>Facility or Group, and Job Family</u>	<u>No. of Hires in Job Family</u>	<u>Actual Percent White</u>	<u>Target Percent White</u>	<u>Composite Deviation</u>
Red Salmon, tender	108	96.3	87.4	2.04
South Naknek, fisherman	70	100.0	83.1	2.69
machinist	76	100.0	91.1	2.49
Wards Cove Class facilities, tender	296	95.3	87.4	2.23

---

\* Job families shown are those with positive differences that are significant at the 5% level.

33. The sample can be further broadened by moving from "new seasonal hires" to "new hires," which includes in the cases considered workers who worked in an Alaska facility during the packing season and also in a base facility (Lake Union Terminal, Wards Cove Home Office, or Columbia Wards Home Office) at some other time during the year. Most of the workers added by this change are employed by defendants on a year-round basis, but a few may have been employed only briefly at a base facility.

34. I have reexamined each of the cases considered above, changing the sample from "new seasonal hires" to "new hires" (i.e., see Table 4 at the same Tab in Exhibit A-279). In almost every case the numbers change slightly. In only two cases would the change affect my conclusions, and these work in opposite directions. At the Red Salmon facility of



Wards Cove Packing Company, I concluded on the basis of new seasonal hires that the under-representation of nonwhites in the tender job family was statistically significant at the 5% level. On the basis of new hires, it would not be. Exhibit A-279, Tab: RS, Table 4. This change in the statistical significance of the under-representation occurs despite the fact that the sample size is only 108 new seasonal hires, but 145 new hires.

35. At the Ekuk facility of Columbia Wards Fisheries, I concluded on the basis of new seasonal hires that the under-representation of nonwhites in the machinist job family was not statistically significant at the 5% level. On the basis of new hires, it would be statistically significant. Exhibit A-279, Tab: EK, Table 4. The change in statistical significance is due, in part, to the increase in sample

size from 64 new seasonal hires to 79 new hires.

36. The concept of the labor supply for the skilled jobs advanced by the expert witness for plaintiffs, Dr. Robert J. Flanagan, is very different from what I have used above. In general, he assumes that the labor supply for the skilled jobs in the salmon canning industry consists of people who have previously worked in the industry, including people who have held unskilled jobs. His analysis assumes, however, that some of the skilled jobs require too much special training or skill to be held by unskilled workers.

37. Exhibits A-282 and A-283 are called "plaintiffs' version" of our statistical analysis. In this version, the jobs that Dr. Flanagan did not include in his analysis (because the jobs are too skilled to be performed by

unskilled workers or because he had no opinion about them) have been moved out to the various skilled job families. These jobs as defined by Dr. Flanagan in his deposition have been grouped together in a separate column labeled "excluded." We can now reexamine the results for Wards Cove Packing Company (Wards Cove and Red Salmon) for New Seasonal Hires, Skilled Workers Weighted by Section of Job, Availability Class Relevant Seasonal, using "plaintiffs' version" of the jobs at-issue (Exhibit A-282, Tab: WC&RS, Table 4). In this case, the comparisons still show an under-utilization of nonwhites in the tender job family, but it is no longer statistically significant at the 5% level. The same loss of statistical significance occurs if we examine the results for the tender job family at the Red Salmon facility

separately, using "plaintiffs' version." Exhibit A-282, Tab: RS, Table 4.

38. Using "plaintiffs' version" of the comparison for Columbia Wards Fisheries (Alitak and Ekuk) makes no difference. (Exhibit A-282, Tab: CWF: AK&EK, Table 4). In "plaintiffs' version" as in "defendants' version" there is no job family where nonwhites are significantly under-represented, and this is also true when the two class facilities, Alitak and Ekuk, are examined separately. (Exhibit A-282, Tab: EK, Table 4). When we use "plaintiffs' version" to make the corresponding comparison for the Castle & Cooke (Bumble Bee Seafoods) facility at South Naknek (Exhibit A-282, Tab: SN, Table 4), the results for the fisherman job family are unchanged. Nonwhites remain significantly under-represented. For the machinist job family, the under-

representation of nonwhites is no longer statistically significant.

39. Up to this point, I have considered the areas from which defendants recruit as a single geographical labor market. In some respects it may be desirable to divide this market. The testimony of expert witnesses for the plaintiffs, Dr. Robert Flanagan and Dr. Shirley Smith, deals largely with migrant seasonal labor. This does not correctly characterize some of the Alaska residents hired by defendants, namely those who live year-round in the vicinity of defendants' Alaska facilities, such as the cannery at Wards Cove. Moreover, defendants' union contracts generally provide that preference in hiring will be given to Alaska residents. For this reason it is useful to examine Alaska and the areas from which defendants draw employees in

the lower 48 states as two separate geographical labor markets.

40. Exhibit A-500 examines data for those new hires who did not live in Alaska when hired. It produced some conclusions different from those obtained by examining all new hires (i.e., from both Alaska and the lower 48). In examining all new hires, I concluded that Wards Cove Packing Company, in its two class facilities combined, under-represented nonwhites among skilled workers in the tender job family. If we look at the table in Exhibit A-500 for Wards Cove Packing Company (Wards Cove and Red Salmon) for skilled workers hired outside Alaska weighted by section of job for availability class relevant seasonal, we find a very slight under-representation of nonwhites, which is not close to being statistically significant. Exhibit A-500, Tab: WC&RS, Table 4. The reason



for this change is that the target percentage of whites has risen--that is, there is a higher percentage of whites in the relevant seasonal labor force outside Alaska than in the two geographical labor markets combined.

41. On the other hand, Exhibit A-500 shows an under-representation of nonwhites that did not appear in previous exhibits. If we examine skilled workers hired outside Alaska at the Ekuk facility in all the jobs at-issue in this case, we find that 97.361% are white, whereas the estimated percentage of whites in the available seasonal labor force outside Alaska is 92.140%. Exhibit A-500, Tab: Ek, Table 4. This difference is statistically significant at the 5% level.

42. In judging the meaning of this under-representation of nonwhites among skilled non-Alaskans at Ekuk, it should

be kept in mind that of the Alaskans hired at Ekuk in the at-issue job families, 91.6% were nonwhite, and all of these were Alaska Natives. Exhibit A-501, Table 2(A). This is why Ekuk does not show under-representation of nonwhites when both geographical markets are considered together.

43. In examining new hires from both labor markets at Ekuk, I concluded that whites were under-represented in the machinist job family to a statistically significant degree. See, ¶35, supra. When we examine the corresponding table in Exhibit A-500, the under-representation is no longer statistically significant. Exhibit A-500, Tab: EK, Table 4.

44. In examining new hires from both labor markets at the South Naknek facility of Castle & Cooke, I concluded that nonwhites were under-represented in

the fisherman and machinist job families to a statistically significant degree. When we examine these job families for non-Alaskan hires only, the underrepresentation is still present but is no longer statistically significant at the 5% level. Exhibit A-500, Tab: SN, Table 4.

45. Exhibit A-501 examines the hires of Alaska residents. Table 18 shows the percentage of nonwhites in the unweighted labor pool for Alaska. There are 14.1% nonwhites in the whole labor force in 1970 and 15.4% nonwhites in the relevant seasonal labor force. Table 2A shows the percentage of nonwhites among new hires in the five class facilities. In four of the five (Alitak, Ekuk, Red Salmon, and South Naknek) the percentage of nonwhites among Alaska residents hired in the job families at-issue is far higher than in the Alaska labor force as a whole,

ranging from 63.5% at Alitak to 91.6% at Ekuk. All but one of the nonwhite Alaska residents hired at these four facilities were Alaska Natives. On the other hand, the cannery at Wards Cove has only 7.4% nonwhites among its new hires of Alaska residents. Exhibit A-501, Table 2(A). This cannery is located near the town of Ketchikan, whose 1970 population was 12% nonwhite. (See plaintiffs' Exhibit 480, p. 29). It should also be noted (A-501, Table 1A) that for Alaska residents the percentage of nonwhites hired in the defendants' Alaska operations (except Icy Cape) is just as high for the at-issue jobs (62.0 percent) as for cannery workers and laborers (61.9 percent).

46. I turn now to the general theory of the case presented by the expert witnesses for the plaintiffs, Dr. Robert J. Flanagan and Dr. Shirley Jeanne Smith. As I have noted previously,

Dr. Flanagan considers the labor supply to the skilled jobs to consist of all workers who have previously worked in the Alaska salmon industry. To measure the racial composition of this labor supply, he relies primarily on a statistical series compiled by the old United States Bureau of Fisheries for the years 1906-1936 and by the United States Fish and Wildlife Service for the years 1941-1955. Using the last five years of this series, he determines that the labor supply of skilled workers to the Alaska salmon canning industry is 47% nonwhite. This percentage is far higher than my estimates discussed above, which are in the general neighborhood of 10% nonwhite.

47. The first objection to the data used to form Dr. Flanagan's estimate is that they are out of date. Even the last year used, 1955, is fifteen years earlier than the 1970 Census data on which I rely,

and long before the period covered by this litigation.

48. Even if the data were up-to-date, however, they would be inappropriate. Dr. Flanagan assumes that unskilled workers in the salmon industry constitute the labor supply to the skilled jobs because they can be adequately trained for skilled work and then promoted. There are some industries, such as the basic steel industry, in which this would be a correct assumption. Such industries have three crucial characteristics: (1) that most skilled workers are in fact hired at the unskilled level and are promoted from below; (2) that the facilities operate all year-round; and (3) that all unionized employees belong the same industrial union [sic]. The defendants' canneries do not have any of these three crucial characteristics. Skilled workers



at defendants' canneries are usually hired directly into skilled jobs, so that the labor supply to these jobs lies largely outside the industry. The very short packing season and the intense pace of work while fish are running leaves insufficient time for the present skilled workers to train unskilled people to take over their duties. Workers in different departments of the canneries are represented by different labor unions, each with its own contract regulating hiring and rehiring, so that we have a craft union situation like that in the construction industry, not an industrial union situation like that in the basic steel industry. In the circumstances of the Alaska salmon canning industry, Dr. Flanagan's theory is entirely inappropriate.

49. The heavy representation of nonwhites among migrant cannery workers

in defendants' facilities is in large part a result of the influence of the International Longshoremen and Warehousemen's Union, Local 37, which is predominately Filipino, and which represents cannery workers at several of the defendants' facilities.

50. The influence of Local 37 on the racial composition of the labor force at defendants' facilities is shown in Exhibit A-498, which shows the detailed racial composition by union status of all hires who were nonresidents of Alaska. Of those nonresidents who were members of Local 37, 68.9% were nonwhite and 58.4% were Filipino (Exhibit A-498, Table 4). For those who were members of other unions or of no union, the percentage nonwhite ranged from 3.1% to 11.1% and the percentage of Filipino from zero to 1.6 percent. In my estimates of the labor supply in the geographic areas from which

defendants draw employees, Filipinos constitute only 0.477% of the relevant seasonal labor force. Exhibit A-278, Labor Pool Tables, Table 4.

51. Unweighted data on the percentage of Filipinos in the population and labor force of the broad areas from which defendants draw employees are available from the published volumes of the Census of 1970. Some such data are presented below in Table 3. Although the percentages of Filipinos are generally slightly higher than in my weighted estimates of labor supply, none of them exceeds one percent.

**Table 3**  
**Percentage of Filipinos in Selected**  
**Population Groups and Areas, 1970**

<u>Area and</u> <u>Group</u>	Number (thousands)		Percent <u>Filipino</u>
	<u>Filipinos</u>	<u>Total</u>	
Total population			
Alaska	1.3	300	0.43
California	135.2	19,953	0.68
Oregon	1.5	2,091	0.72
Washington	11.5	3,409	0.34
Labor force, 16 years and older			
California	62.7	8,338	0.75
Washington	5.1	1,399	0.37
Seattle-Everett SMSA	3.5	611	0.57
Employed workers, Seattle-Everett SMSA			
Craftsmen, foremen, and kindred	0.3	82	0.37
Operatives including transportation	0.5	66	0.76

Source: Census of Population, 1970.



52. For institutional reasons connected with the history of the industry and of Local 37, Filipinos are greatly over-represented among cannery workers. Dr. Flanagan's theory of labor supply would require that an employer whose work force in one department greatly over-represents a particular racial minority should over-represent this minority correspondingly in all other departments. I cannot see any basis in labor economics for such a requirement.

53. Dr. Flanagan has asserted that defendants engage in occupational segregation by confining nonwhite workers to unskilled jobs. Exhibit A-499 indicates that to the extent this occurs, it is the result of the influence of Local 37. Table 1 of that exhibit examines the racial composition of new hires at the class facilities who were not

residents of Alaska, with members of Local 37 excluded. Of 808 such hires in the cannery worker and laborer departments, 79, or 9.8% were nonwhite. Of 2,001 such hires in the at-issue departments, 168 or 8.4% were nonwhite. These percentages are very similar. Comparable results are obtained when all Alaska operations of defendants are considered. (Tables 4 and 9).

54. Both Dr. Flanagan and Dr. Smith state the view that nonwhites are heavily over-represented in the labor supply of seasonal migrant workers generally. This view is based on their examination of studies of migrant farm labor, of which the most recent cited is Leslie Whitener Smith and Gene Row, The Hired Farm Labor Force of 1976, U.S. Department of Agriculture Economics, Statistics and Cooperatives Services, Agricultural Economic Report No. 405, July 1978. This

report shows (Table A-16, p. 41) that a preponderance of migrant farm workers who traveled 1,000 or more miles to reach their most distant work place in 1976 were Hispanic. Minorities were not heavily represented, however, among hired farm workers who lived in Standard Federal Region X (Alaska, Idaho, Oregon, and Washington) in December 1976. Hispanics, blacks, and other nonwhites were only 6% of the 204,000 hired farm workers in the region (Table 5, p. 14). (These figures include nonmigrants).

55. I seriously question the relevance of information on migrant farm workers for seasonal migrant industries in general and for the Alaska salmon industry in particular. There are other important seasonal migrant industries besides agriculture, including heavy and highway construction and the Eastern seasonal resort hotel industry. Although

little data is available on the racial composition of the workforce in seasonal resort hotels, casual observation indicates that it is predominately white.

56. D. Quinn Mills, in his book Industrial Relations and Manpower in Construction (1972) states that "construction crews on highways, pipelines, transmission lines, and heavy construction projects are mobile because of the location of the projects and their nature." (p. 138) The word mobile in this quotation refers to geographical mobility. He identifies five trades as making up the heavy and highway branch of the industry: carpenters, laborers, operating engineers, cement masons, and teamsters. (p. 14) The data he gives on the racial composition of these five trades in 1970 range from 5.0 percent nonwhite for operating engineers to 30.3% nonwhite for cement masons (p. 145).

Data for 1974 from the Federal Highway Administration show 15% minorities among equipment operators on Federal highway projects. H. R. Northrup and H. G. Foster, Open Shop Construction (1975), p. 342.

57. The Alaska salmon industry offers jobs to migrant workers that are very different from migrant jobs in agriculture. Workers are transported to salmon canneries by plane or ship at the employer's expense. Migrant agricultural workers are usually transported to job sites in dilapidated trucks or buses, usually at their own expense. (See Lloyd H. Fisher, The Harvest Labor Market in California, 1953, pp. 57-58). They may find no work available when they arrive, and unlike cannery workers get no pay when work is not available.

58. Most important, salmon canning is well paid, while migrant workers in



agriculture are paid very little. The study by L. G. Smith and G. Rowe cited by Dr. Shirley Smith tells us (p. 10) that migrant farm workers in 1976 earned an average of \$1,807 for 82 days of farmwork. This is \$21.80 per day, or \$153 for a seven day week. In the same year, skilled workers in the defendants' facilities in Alaska were earning \$400, \$500, or even \$600 a week, much more than workers with comparable skills in Seattle or Portland. See, Table 4 attached. It is not at all surprising that whites are not attracted to low wage migrant farm work and, therefore, that Hispanics with limited job alternatives would constitute most of the labor supply for this kind of work. At the same time it is not surprising that whites would be eager to work in the high-wage salmon canning industry. In general, I find the testimony of Dr. Flanagan and Dr. Smith of limited

relevance to the circumstances of this case.

\* \* \*

#### CROSS EXAMINATION

[pp. 1917-1929]

BY MR. ARDITI:

Q. Dr. Rees, Exhibits 278, and A-278 thru A285 were prepared under your supervision, were they not?

A. Yes, they were.

Q. And they reflect your conclusions using different assumptions, is that correct?

A. I draw my conclusions from [sic] them, yes.

Q. Now, each of these tables is arranged by facilities or a combination of facilities, is that correct?

A. That is correct.

Q. Where hiring responsibilities, is ultimately in the hands of each cannery superintendent, you would look at the

percent non-white hired separately at each cannery to determine whether there was any discrimination, would you not?

A. Yes, under your assumption as you have stated it, I would.

Q. And, in exhibits A-278 thru A-285, that would be the first five tabs, would it not?

A. Yes, it would.

Q. Now, within each tab of each of each [sic] of those exhibits, you have eight tables, correct?

A. That's correct.

Q. In tables five thru eight, you take as the availability class everyone in the work force or in the labor force, correct?

A. Correct.

Q. Now, within any given geographical area, most people in the labor force would prefer full-year

employment to seasonal employment, would they not?

A. That's generally correct, yes. It depends a little bit on the wage of the seasonal employment. The higher the wage in the seasonal employment, the more people would apply.

Q. But generally, that is correct?

A. Generally, that is correct.

Q. Now, tables five thru [sic] eight do not adjust for availability for seasonal work, do they?

A. No, they assume that everyone in the labor force is available.

Q. So is it fair to conclude that to the degree that most people prefer full-year employment to seasonal employment, tables five thru [sic] eight are not a good measure of availability?

A. I think tables one thru [sic] four are a better measure, but I wouldn't

go so far as to say that five thru [sic] eight are not a good measure.

Q. Now, within tables--or, in tables on thru [sic] four, you make an attempt to adjust for availability for seasonal employment, correct?

A. Yes, we attempt to identify those members of the work force who are most likely to be interested in accepting seasonal employment.

Q. Okay, but you make no adjustment for those interested in migrant work, do you, as opposed to seasonal work.

A. I assume that those who are interested in migrant seasonal work are a subsection of those who are interested in seasonal work generally.

Q. Okay, my questions is, you do not, do you make a separate adjustment for those interested in migrant seasonal work

as opposed to those interested in non-migrant seasonal work, do you?

A. I know of no way of doing so either through this data set or any other.

Q. Is your answer no?

A. Would you repeat the question, counsel?

Q. In tables one thru [sic] four, you do not make an effort to adjust for people interested in migrant seasonal work as opposed to non-migrant seasonal work, do you?

A. No, I do not.

Q. You would agree, would you not that in any given geographical area, most people would prefer full-year fixed location employment to migrant seasonal employment, correct?

A. Well, that's true of most people in the availability class. Every one in the work force, I would not assume



that is true with most people in the other availability class relevant to seasonal.

Q. I am asking you a general question. Within any geographical area, is it not true that most people prefer migrant--I'm sorry--prefer full-year fixed location employment to migrant seasonal employment?

A. Yes, it is true. I thought that had been asked and answered before, counsel.

Q. In tables one thru [sic] four, you focus on certain groups in looking at your relevant seasonal availability class, correct.

A. (No response).

Q. Certain occupational groups?

A. Yes, those tables are by job family.

Q. Okay, what I am getting at is how you developed your target figure for those tables, okay?

A. Yes, well, that was described yesterday in Dr. Price's testimony how we did that, I will be happy to explain further if that is helpful.

Q. You focused on certain occupations, among other things, in developing your availability figures in tables one thru [sic] four, correct?

A. Yes, in the availability figures for the individual job families, we focused on certain occupations.

Q. And certain industries as well?

A. The industries are taken into account in defining the availability class, not in defining the relevant workers in a particular job family.

Q. Among the industries that you focused on in your availability figures in tables one thru [sic] four, was the construction industry, correct?

A. That is correct.

Q. And another was those employed as teachers?

A. Yes, in the education industry, generally, not necessarily as teachers.

Q. And, another was those employed in the canning of fruits and vegetables and seafoods?

A. Correct.

Q. And, another was those engaged in agriculture?

A. Correct.

Q. And then students were yet another?

A. Yes.

Q. And the unemployed was yet another, correct?

A. Correct.

Q. Okay, let's start with people involved in construction. The Alaskan salmon canning industry employment in that industry peaks in the [sic] summertime, correct?

A. That's correct.

Q. And, employment in the construction industry also peaks in the summertime, does it not?

A. Yes, in most parts of the country. I don't know how big the season is in the Pacific Northwest.

Q. But you'd expect it to be large in the State of Alaska, wouldn't you?

A. If construction is started, yes, very large.

Q. So far as the time of the year goes, would it be fair to say that the summer is that time of the year when people in the construction industry would be less available for work in the salmon industry?

A. They may nevertheless be between jobs during the summer because employment in that industry is often for short stretches.

Q. That wasn't my question. Let me ask it again. Is it fair to say that the summer would be that time of the year when people in the construction industry would be less available for work in the salmon industry?

A. That would certainly be true in Alaska. I would not know whether it is true in Washington or Oregon.

Q. That is because you are not familiar with the weather patterns here?

A. That's right. It was my impression you have mild winters here and they would not impede construction work. You certainly know more about that than I do.

Q. Now, some construction trade hire out of hiring halls, is that correct?

A. Yes, many of them do. The unionized construction trade, not all construction is union.

Q. Now, among the unionized construction trades, hiring is often done or dispatching is often done on the basis of experienced weighted dispatched lists, is it not?

A. I believe that it is. I'm not very familiar with how hire halls work in the construction industry.

Q. Well, is it your understanding that people who have "X" hours of work in the trade, in the locale, would be given first preference, and people who have smaller number of hours have a more preference?

A. That is certainly one possible arrangement, and I believe that it is fairly common.

Q. So, if a person who had been engaged in the construction industry left the industry during the period of peak development, namely the summer, he or she might lose the opportunity to build up



preferences for dispatches in the latter parts of the year, correct?

A. That's true. If the person is a unionized construction worker. Throughout this country, most construction work in the residential construction is non-union, and therefore, it doesn't have a hiring hall and doesn't have this kind of preference.

Q. But in your availability figures you made no effort to weed out non-union from union construction workers, did you?

A. We can't because the census doesn't identify union memberships.

Q. At least for unionized construction workers, who work under this particular type of dispatch system, the loss of experience which could affect employment opportunities in the latter part of the year would be a reason not to

take employment in the salmon industry, wouldn't it?

A. Yes, it might.

Q. Now, you have been a college professor for quite some time, correct?

A. Well, I no longer am, but I was for quite some time.

Q. And, let me ask you whether you, yourself, say in the last twenty years, were ever available, ever available during the summer to go to work in Alaska as a cannery worker?

A. No, sir, I was not.

Q. And one reason you found employment in your profession is that was during the summer?

A. Yes, I did most summers.

Q. And another is was that going to Alaska would cause you a certain amount of personal dislocation?

A. Yes, though I never lived in that part of the country, counsel.

Q. Now, even putting aside the question of wages, you could lose certain benefits to your career if you took a summer off to go to Alaska as opposed to doing something like working on a research paper, correct?

A. Early in my career that would have been correct.

Q. And so there are a number of reason [sic] why you, yourself, would not have been available for work in Alaska, correct?

A. Yes.

Q. And that is true of most other college professors you know, isn't it?

A. Well, the ones I know tend to be at the major universities and have the best opportunities for summer work. I would not want to generalize to all college professors and all little colleges across the country. It is my impression that professors in small

liberal colleges are quite frequently available for other kinds of employment during the summer.

Q. My question was that is true of most of the other college professors you know, isn't it?

A. Yes, it is.

Q. And in fact, to your knowledge, that is true of most college professors on the West Coast, isn't it?

A. I know very few college professors on the West Coast.

Q. To your knowledge, that is true of most college professors on the West Coast, isn't it?

A. It is true of the ones I know.

Q. Okay, did you make any attempt in devising your availability figure to weed out college professors?

A. No, I don't think we should have.

Q. Now, at least some high school teachers are not available for migrant seasonal work, is that correct?

A. In all parts of this availability class some people are not available for migrant seasonal work, we're not attempting to identify a class of people all of whom are available, we are attempting to identify a class of people from whom an employer might reasonable [sic] be expected to draw some employees.

Q. I gather that your answer is at least some high school teachers are not available for migrant seasonal employment, correct?

A. That's correct.

Q. And you do not have a way of determining exactly what percentage of high school teachers are available and what percentage are not available, do you?

A. No, I do not.

Q. And in fact those available could be comprised only of a small percentage of high school teachers, correct?

A. They could.

Q. Now, in the other industry that you focused on in determining your availability figures for table one through four, there are at least some full year employees, for example, a manager, or a mechanic in agriculture who might be a full year employee, correct?

A. Yes, he might.

Q. And in the industries that you looked at in determining your availability figure for tables one through four, you did not factor out those who had full year employment as opposed to those who had only seasonal employment, correct?



A. That's correct. Well, there is one exception to that, and that is the unemployed who form a fairly substantial part of that class, and my definition is they were not employed at the time the census was taken.

Q. I'm speaking of industry classifications.

A. Rather than the whole availability class?

Q. Right.

A. With that qualification, it is correct.

Q. Now, would it be fair to say that whether a given student takes work in the salmon industry during the summer depends on whether or not better options are available to him or her?

A. Yes, that's correct.

Q. And you did not adjust your data to exclude students who had better options, did you?

A. There is no way of identifying in that data base or any data base that I know of.

Q. Now, even among the unemployed there would be people who are not available for migrant seasonal work in the this [sic] industry.

A. There might be some, sure.

Q. Of your relevant seasonal availability class, namely the ones in table one through four, do you know what percentage of those people were involved in the construction industry?

A. I don't know off-hand. We could probably provide that if it is important.

Q. Do you know what percentage are teachers?

A. No, I don't have a recollection of how that available class devised among its various components.

Q. Now, in arriving at your availability figures, you used the census one and one hundred use tapes, did you not?

A. That's correct.

Q. And the occupational detail in those tapes appears only at the level of county groups, is that right?

A. That's correct.

Q. The entire State of Alaska forms one county group, doesn't it?

A. Yes, it does.

Q. Do you know what the percent non-white is in the State of Alaska?

A. My recollection is that for the total population of Alaska, it is about fifteen percent.

Q. And that would be considerably lower than the percent non-white in Alaska native villages, wouldn't it?

A. Yes, very much so.

Q. Is it your understanding that those Alaska residents employed at Ekuk, Bumble Bee, Red Salmon, and Alitek [sic], during the case period, came almost entirely from Alaska native villages?

A. Yes, that is my understanding with respect to the particular facilities that you have named.

Q. You used various types of weighting schemes in devising your availability figures, correct?

A. Yes, we used two. We weight a job and we weight by the section of the job. My preference is for the second of the two. The reason, would you like me to explain the reason for that?

Q. Well, I would rather you just answer the question, frankly. I think--it is up to the court if the court--

THE COURT: It could be covered on re-direct.

BY MR. ARDITI:

Q. In weighting by job, then, you used the residence of the people actually hired in those jobs to determine the weighting that should be given in the availability figure, correct?

A. Yes, the people hired in those jobs at all of the Alaskan facilities of the three defendant companies, with the exception of the facility at Icy Cape.

Q. Now, when you weighted by section, you took as one section, cannery worker and laborer, correct?

A. Correct.

Q. And you took as the other section all jobs except cannery worker or laborer, correct?

A. Correct.

Q. And when you devised availability figures for each of the non-cannery worker and non-laborer jobs, you weighted by that section that was

comprised of jobs other than the cannery worker and other than laborer, correct?

A. Yes, for each of the job families.

Q. Now, where an employer recruits can itself be discriminatory, can it not?

A. It can be.

Q. And where there is some reason to believe that an employer's recruitment practices are discriminatory, it would be less preferable than in other cases to use a weighting scheme based upon where employees were hired, correct?

A. I have no reason to believe that that's true in this case.

Q. My question was a general one, and you can you answer it, or would you like--

A. If I had a reason to believe that an employer was deliberately recruiting in some areas and not in others in order to influence the racial



composition of his work force I would have to take that under account.

Q. And you would also have to take it into account if you had reason to believe that the employer was deliberately recruiting in heavily non-white areas for low paying jobs or less desirable jobs, and deliberately recruiting in predominately white areas for high paying or more desirable jobs, correct?

A. This is still a hypothetical question?

Q. Yes, it is.

A. I would have to take those facts into account.

Q. Now, in your table you attempt to take a skills in the sense that on at least some occasions you looked at census occupational categories that you felt were geared to skill?

A. Yes, that is correct.

Q. Now, in selecting those occupational categories, you relied solely on Mr. DeFrance's analysis, is that correct?

A. That is correct.

\* \* \*

[pp. 1929-1930]

Q. Is it fair to say then that your statistics on the availability of non-whites with the relevant skills rises and falls with Mr. DeFrance's cross-mapping?

A. Yes, if Mr. DeFrance's cross-mapping bore no resemblance to the skills that were needed in these job families, then we would be in trouble.

MR. ARDITI: Now, could the witness be handed Exhibit A-278.

(The exhibit was handed to the witness by the Bailiff).

BY MR. ARDITI:

Q. Do you have that in front of you?

A. Yes, I do.

\* \* \*

[pp. 1931-1932]

Q. If you're more comfortable, we can turn to Red Salmon, that is perfectly fine, turn to Red Salmon and I'm going to ask you to compare tables one and three.

A. Alright.

Q. Now, your availability figures were given in the row labeled [sic] "target", right?

A. That is correct.

Q. And they are given as percent white rather than percent non-white?

A. Correct.

Q. Is it fair to conclude by comparing tables one and three that when you adjust for skill, you find that there are more non-whites, in other words the availability figure for non-white fishermen increases?

A. The target in table one is eighty-nine point five zero six, in table

three it is eighty-two point six three zero, yes, in that particular instance it does increase, that is a possible result.

Q. Now, let's look at another occupation or another category [sic]. Let's look at machinists.

A. The same two tables?

Q. The same two tables.

A. Yes, okay.

Q. Now, in those two tables, when you adjust for skill, the availability of non-whites goes down somewhat?

A. In table one, we have got the same availability figure right cross the tables and in table one the availability is not being done by job family.

Q. I understand that, but in table three it is, correct?

A. In table, it is [sic]. In the case of machinists, the availability of non-whites is lower, in table three, or it

is lower in table three than it is in table one.

Q. Okay, so when you adjust for skills with machinists, what you are really doing is bring the availability figure for non-whites down about three percentage points, is that correct?

A. That's correct.

Q. Now, I would like to ask you about instances in which you found statistically significant under-representation of non-whites, okay?

A. Yes.

\* \* \*

[p. 1941]

Q. In fact, you find statistically significant under-representation of non-whites in machinist jobs and company fishermen jobs at South Naknek in tables one, two, three, four, five, six, seven and eight of that exhibit?

A. Yes, I would say that particular case, the evidence of under-representation is fairly conclusive and does not depend on which table you look at.

Q. Now, in Exhibit A-280, you use yet another method of counting hire, correct?

A. Yes, 280 uses all hires that it counts a person each time he appears on a payroll, even if he has appeared in that job, that facility in the previous season.

Q. Let's see if we can't verify that. It refers to all seasonal hires?

A. All seasonal hires, correct.

Q. So that would then indicate or count as a hire each occasion an individual appeared in a seasonal job, correct?

A. Yes, correct.



Q. And as you understand it, the deviation of hires for seasonal jobs here is essentially a definition that Dr. Flanagan was using?

A. That's correct.

Q. Let's look at the South Naknek tab of Exhibit A-280, okay?

A. Yes.

\* \* \*

[pp. 1942-1946]

Q. Okay, let's go back to table one of the South Naknek tab of Exhibit 280, A-280.

A. Correct.

Q. Now, in table--or in that table, we find statistically significant under-representation of non-whites, not only in company fishermen and machinist jobs, but also in carpenter and tender jobs, correct?

A. Correct.

Q. And we find the same thing in table two, correct?

A. That is correct.

Q. In table three, we find statistically significant under-representation of non-whites not only in fishermen and machinist jobs, but also in tender jobs, correct?

A. Correct.

Q. Now, in table four, table five, and table six, and table eight, we also find statistically significant under-representation of non-whites not only in fishermen and machinist jobs, but also carpenter and tender jobs, correct?

A. You skipped seven, but included eight, is that correct?

Q. Yes.

A. Yes, that is correct.

Q. Now, let's turn to the Red Salmon tab--strike that--let's go to Wards Cove.

A. Wards Cove in A-280, I have it.

Q. Okay, on this table, table one, we find statistically significant under-representation of non-whites in miscellaneous, machinists and tender jobs, correct?

A. Correct.

Q. In table two, we find statistically significant under-representation of non-whites in machinists and tender jobs, correct?

A. Correct.

Q. In table three, we find statistically significant under-representation of non-whites in machinists jobs, correct?

A. Correct.

Q. And table four, we find it in machinists and tender jobs, right?

A. Right.

Q. And in table five, we find statistically significant under-representation of non-whites in three

department, miscellaneous, machinist, and tender, correct?

A. Correct.

Q. And in tabale [sic] six, we find it in machinist?

A. Yes.

Q. The same in table seven?

A. Yes.

Q. And in table eight, we find it in both machinists and the tender jobs, correct?

A. Table eight?

Q. Right.

A. I show for tender composite deviation of one point nine zero five which would not be significant at the five percent level as to the significance.

Q. Okay, let's turn to Red Salmon.

A. Yes.

Q. In table one, we find statistically--

THE COURT: Mr. Arditi, you don't need to go through these, I can go in and read these and see which is more than one nine six if that is the point of examination, is that the point of it?

MR. ARDITI: That is basically--

THE COURT: Well, I think I can handle that.

BY MR. ARDITI:

Q. In Exhibit 281, you used a definition of "all hires", right?

A. Yes.

Q. And how does that differ from the definition that you use for hires in Exhibit 280?

A. Again, the difference is the people who work during the winter at Lake Union Terminals, they are included in 281, excluded in 280.

Q. Now, you mentioned at page five of your affidavit that you prefer using new hires to all hires, is that correct?

A. That's correct.

Q. And this is in essence saying you have a different view of vacancies than Dr. Flanagan?

A. That's right.

Q. Now, in any of your tables that counts new hires or new seasonal hires, you look only at hires which occurred [sic] from 1981 onward, is that correct?

A. 1971.

Q. I mean '71 onward, is that right?

A. Yes, for the season 1971 through '80.

Q. And I think you say at page five, lines twenty-eight through thirty that you believe that this is acceptable because if there is any racial discrimination your method of counting hires would show it in the initial hiring, correct?



A. That's correct. If there is discrimination in the period covered by the litigation.

Q. Exactly. Now, if there were discrimination in 1970, your figures would not show it, correct?

A. If there had been discrimination prior to 1970 that was reflected in the composition of the 1970 labor force, yes.

Q. Now, it would be possible that a policy of rehiring past employees in their old jobs would--would or could perpetuate discrimination that occurred prior to 1971, isn't it?

A. Well, it is. May I state my reasons for preferring new hires to all hires?

MR. ARDITI: Well, that would be up to the court again.

THE COURT: Alright, Mr. Duncan will cover that.

THE WITNESS: Alright.

BY MR. ARDITI:

Q. Now, your definition of hires does not take account of this possibility that there may have been discrimination in 1970 which is perpetuated by a practice of rehiring past incumbents in their old job, does it?

A. That practice is required under the defendants' union contracts.

Q. Dr. Rees, that wasn't my question. My question is--

THE COURT: Just answer the question.

THE WITNES: Alright. Would you restate the question, counsel?

BY MR. ARDITI:

Q. Your preferred method of counting vacancies does not take into account of possible discrimination in 1970 which is them [sic] perpetuated

through a practice of rehiring past incumbents in their old jobs?

A. No, it does not.

\* \* \*

[pp. 1947-1955]

Q. Now, as I understand these tables, when you find something in the composite deviation row, which is minus one point nine six or less, we have statistically significant under-representation of whites, is that correct?

A. That's correct.

Q. Let's start with--

THE COURT: Excuse me, just a minute. Did you say minus one point six nine six or less?

MR. ARDITI: Yes, it would go to--

THE WITNESS: You figure the bigger minus number.

THE COURT: Alright.

MR. ARDITI: I wasn't sure how to phrase that exactly.

THE COURT: Alright.

BY MR. ARDITI:

Q. Let's start with this miscellaneous column there.

A. Okay.

Q. Well, first of all, to your knowledge, miscellaneous jobs at Ekuk are not covered by the Local 37 contract, are they?

A. I don't have any knowledge of that, I don't really know what has been put in the miscellaneous job column at Ekuk.

Q. Well, the minus six point six nine six standard deviation would show a highly significant under-representation of non-whites--I'm sorry, a highly significant under-representation of whites, wouldn't it?

A. Yes, it would.

Q. Okay, I want you to assume those are non-union jobs, okay?

A. Alright, I will assume that.

Q. That under-representation, then, could not be attributable to any union practices, could it, in hiring?

A. If those jobs are not covered by any union, no, it would not.

Q. Let's look at the beachgang, it is your understanding that that job is covered by the Alaska Fishermen's Union rather than any other?

A. I have looked at the agreements, counsel, but I don't have detailed recollection of just which jobs at which facility are covered by the facility. There are a lot of unions involved here.

Q. Alright. We find highly significant under-representation of whites in the beachgang job, don't we?

A. Yes, we do.

Q. And if it is your understanding that there are no Local 37 workers at Ekuk?

A. Yes, that is my understanding.

Q. We find a statistical [sic] significant under-representation of whites in the culinary department, correct?

A. Correct.

Q. And, we find it in the storekeeper, stockroom department, correct?

A. It's statistically significant. It's not as pronounced as in the other cases you have mentioned.

Q. And we find it in the tender department, correct?

A. Correct.

Q. And we find it to an almost alarming degree in the cannery worker department, don't we?

A. Why is it alarming?



Q. Well, it is minus thirty-five point eight one zero standard deviation.

A. I find it large but not the least alarming.

Q. What is the statistical probability that you could come up with a disparity that great between the actual percent white hired and the target percent white solely by chance?

A. If you were hiring these workers solely by chance from the entire area from which these defendants recruit, that would be a highly improbable event. In fact, we know, both you and I know that is not the way cannery work is not recruited at Ekuk. I can explain that if you want me to, but it isn't alarming.

Q. Minus one point nine six standard deviations would indicate that something other than chance is happening at the level of ninety-five percent certainty, correct?

A. Yes.

Q. Okay--

A. That you're not hiring at random from the whole geographical area on which these tables are based.

Q. Okay, can you give me an idea of what percent certainty you find at the level of minus thirty-five point eight one zero standard deviations?

A. Well, it's an event that would happen by chance in a random draw from the whole population, certainly, that's the one time in ten thousand, and it is way out of the tale of the probability distribution. I'm sure Dr. Wise could compute it for me, but I can't guess it.

Q. Now, is it fair to assume, just in lay people's terms, what or when you find these minus signs which are really finding as a suspicion of discrimination against whites?

A. You can call that if you like, what you are finding is that that particular work force is heavily non-white.

Q. Okay, but your finding has such a high degree that it raises the inference of discrimination against whites, correct?

A. Well, that's one way of describing it.

Q. Now, just generally speaking, would it be fair to say that there is a fairly high incidence of this statistically significant under-representation of whites in the job tables that you prepared, the exhibits you prepared?

A. Yes, it happens more often than the reverse, than statistically significant discrimination against non-whites.

Q. And it happens at Ekuk where there is no Local 37, correct?

THE COURT: You are talking now about cannery workers?

MR. ARDITI: I'm talking about all departments, and I will be more specific.  
BY MR. ARDITI:

Q. It happens at a number of departments at Ekuk where there is no Local 37 workers, correct?

A. Correct.

Q. It happens at Red Salmon, for example, in labor departments were [sic] workers are not represented by Local 37, correct?

A. If you give me just a second to get the--that is correct.

Q. It happens at Alitek [sic] in miscellaneous, beachgang, carpenter, tender and labor jobs, none of which are covered by Local 37, correct?

MR. DUNCAN: Your Honor, I would like to know which table we're looking at when we're coming up with these particular figures.

THE COURT: Alright, please refer to the table, Mr. Arditi.

BY MR. ARDITI:

Q. Well, let's start with table one.

THE COURT: Of which cannery?

MR. ARDITI: Alitak, Exhibit A-278.

THE WITNESS: Okay.

BY MR. ARDITI:

Q. It happens at miscellaneous--

THE COURT: Wait a minute. Alright, go ahead.

BY MR. ARDITI:

Q. It happens in miscellaneous, beachgang, carpenter, culinary, machinist, tender, laborer, correct?

A. Correct.

Q. And none of those would be attributable to Local 37, would it?

A. No, some of them are represented by other unions that have clauses in their agreement giving preferences to hiring of residents of Alaska.

Q. Now, if your availability figure for non-whites were hire, [sic] it would reduce the incidence of this statistically significant under-representation of whites, wouldn't it?

A. Yes, it would.

Q. And, in fact one possible interpretation of this pretty substantial incidence of statistically significant under-representation of whites is that your non-white availability figure is too low, correct? Isn't that an interpretation or possible interpretation of it?



A. I think maybe too low for some of the facilities on Bristol Bay which in some unskilled job categories hire heavily from native villages and not from the region as a whole, but I have no way of making separate availability figures for those facilities from the census data because the census date [sic] treats Alaska as a unit.

Q. So, to that degree, your reliance on the one and one hundred public use sample tapes has produced for you availability figures for non-whites in the Bristol Bay canneries which are in fact too low, correct?

A. They are too low for those unskilled and semi-skilled jobs where recruitment is in the native villages, yes. They are not necessarily too low for some of the skilled jobs where recruitment is in the Lower Forty-eight.

Alright, but if going back to an earlier section of our discussion today you had reason to believe that there was deliberate recruitment of cannery workers only in heavily non-white areas, and deliberate recruitment of other people for other jobs in heavily white areas, then that availability figure would be too low, not only for what you lable [sic] the unskilled jobs, but also for the other jobs as well, correct?

A. I'm sorry, I lost that, counsel, could you repeat it?

Q. If I understood your previous response correctly, it was that one possible interpretation of this underrepresentation of whites was that your availability figure for non-whites in unskilled jobs in the Bristol Bay canneries was too low, correct?

A. Yes, given the recruitment patterns of those canneries for those jobs.

Q. And you attributed that to the fact that the census one and one hundred public use sample tapes do not give fine enough detail on a geographical level for you to get an accurate assessment, correct?

A. That is true within the State of Alaska only. In the other states they give a sufficient detail.

Q. And the reason, I believe, that you limited that conclusion just to what you call the unskilled jobs is that you felt that that was the only place where--I'm sorry--the reasons that you limited that to what you called the skilled jobs is that you believe that only recruitment for the unskilled jobs was done in Alaskan native villages, correct?

A. That's correct.

Q. Now, if you had reason to believe that the recruitment practices at least as far as selecting which location to recruit for different jobs was concerned, you had reason to believe that the recruitment practices themselves were deliberately discriminatory, then you would also have to suspect, wouldn't you, that your use of the one and one hundred public use sample tapes was also inappropriate for what you call the skilled jobs at the Bristol Bay cannery, correct?

A. If I believed that, that would be correct, yes.

Q. Thank you.

A. I have not--I happen not to believe it, I think there are other ways in which this can be explained, should be explained.

Q. Let me ask you to draw on your general expertise which I gather was

substantial as a labor economist. Generally, in our particular society, we find that more discrimination against non-whites than we do against whites, don't we?

A. Yes, that's correct.

Q. And from your examination of the wage information in this case, we could conclude that the whites receive the higher paying jobs as opposed to the lower paying jobs, correct, on the whole?

A. On the whole, although the cases you have just been citing are cases of over-representation of non-whites in skilled jobs so it is by no means a uniform picture.

Q. That is not my question. If you look at the higher paying departments at the canneries, you will find they are more heavily white than the lower paying departments, correct?

A. That is in general correct.

Q. Okay, so when you were looking at the distribution of non-white and non-white workers at the canneries, you find that the white workers generally get the better paying jobs as opposed to their non-white counterparts, correct?

A. There is a high proportion of white workers in the better paying jobs, yes.

Q. And based on the contact you had in this case with management, you would conclude that management is largely white, is it not, at least at the highest levels?

A. The representatives of management I have met have been white, yes.

Q. I gather from your tables that you find there is a higher incidence of statistically significant under-representation of whites than of non-whites, correct?



A. Taking all departments of the cannery together, or the facilities into account, that is correct, yes.

Q. Dr. Rees, does it jar your common sense at all to conclude that in light of the fact that society-wise, there is a, there is greater discrimination [sic] against non-whites than whites, in light of the fact that whites generally get the better paying jobs at the cannery than non-whites and in light of the fact that management at the upper levels of the canneries is white rather than non-white, doesn't it jar you [sic] common sense at least to some degree to conclude that there is greater discrimination against whites than non-whites?

A. I haven't concluded there is discrimination against whites, I have concluded that whites are over-represented in certain departments. We

haven't yet had an opportunity to discuss why.

Q. Now, Dr. Rees, I gather from your affidavit that it is your belief that Local 37 in some way contributes to the substantial number of non-whites in this particular industry, is that correct?

A. Yes, in those facilities where they represent the cananery [sic] workers and some of the culinary workers, they clearly contribute to the higher proportion of non-whites in those two departments.

\* \* \*

[pp. 1958-1959]

Q. Let me just ask you this, Dr. Rees, in your view as a labor economist, have you ever encountered situations where an employer tries to blame his discrimination on a union?

A. To blame it on a union?

Q. Yes.

A. A few cases, yes.

Q. Now, is it not correct to say, in your view, that an employer's statements about the source of discrimination are not always reliable for just that reason, mainly that they will try to blame it on another?

THE COURT: I think that question is a question that I am going to have to resolve, Mr. Arditi.

MR. ARDITI: He has written about it.

THE COURT: Okay, well, if he has then ask him about it.

BY MR. ARDITI:

Q. Have you written on that subject?

A. Yes, the statement you have just made, I think is a quote or a paraphrase from my textbook, "The Economics of Work and Pay".

\* \* \*

[p. 1960]

Q. Now, in your view as a labor economist, one form of employment discrimination occurs when an employer succumbs to the prejudice of its employees, correct?

A. Correct.

Q. Okay, and this can lead to segregated work crews?

A. Can, yes.

Q. And an example of this is hiring Black janitors to work at night by no Blacks in production worker jobs, correct?

A. That would be an example, yes.

Q. And this minimizes contacts between whites who may be prejudice and non-whites, correct?

A. Correct.

Q. And another way of minimizing this contact in a facility that provides

housing is to have separate housing for whites and non-whites, correct?

A. Yes.

\* \* \*

[p. 1969]

Q. Dr. Rees, what is the probability in any given table, in Exhibit A-278, that there would be one or more out of ten job families with more--with a positive one point nine six standard deviation?

A. If you regard each job family hiring into each job family as an independent event, then Dr. Wise has calculated that probability by twenty percent. In one table out of five you would expect to find such an event. That is, simply by chance, simply as a random of cards.

\* \* \*

BY MR. ARDITI:

\* \* \*

A-361

[pp. 1970-1973]

Q. Now, is it your understanding that many of the native villages are coastal villages?

A. I know a map has been introduced and where the villages are, I haven't examined it.

Q. Why don't you assume that many of these villages are coastal villages, and please assume further that many of the residents of these villages grew up around water and around boats. Under those circumstances, when you weight by areas from which the employer recruits for that job, isn't it possible that you are losing [sic] a great many non-whites in these areas who would have the skills required for tender or company fisherman jobs?

A. I think that is probably right, that may very well be why in your earlier cross-examination you discovered in the

A-362



tables some of those job families in which non-whites were over-represented.

Q. Let me--you would use those figures then for tender jobs, correct, you would want to weight by cannery worker hiring for such tenders?

A. No, no. If we had data, which unfortunately we don't, which gave us geographical detail within Alaska by occupation, I would have wanted to use those. They don't exist, and that would show up these people that you are talking about that have whose occupation is fisherman and whose occupation is boat caption [sic] or whatever.

Q. It would be fair to assume, would it not, that if you weighted by the entire cannery worker work force rather than by specific jobs or job sections that percent of non-white in your availability figure would go up?

A. It goes up slightly, yes.

Q. And it makes at least some sense to do that for jobs such as tender and company fisherman which involve marine work, correct?

A. Arguable.

Q. Now, is it your understanding that the percent non-white and cannery worker jobs at Ekuk is as high or higher than at any of the other canneries at issue?

A. I would have to check that. It can be done very easily.

Q. Why don't you check it.

A. The cannery worker jobs at Ekuk are approximately thirty-five percent white. It is fairly low. I'm sorry, that is Alitak. Ekuk, at Ekuk it's thirty-three percent white or whites, it is a couple of percentage points below Alitak. South Naknek is forty-eight percent white, cannery department. Red Salmon is thirty-six percent white, Wards Cove,

sixty-nine percent white. So, yes, it is one of the lowest.

Q. That is one of the lowest percent white?

A. Percent white, yes.

Q. And correspondingly, it has the highest percent non-white, correct?

A. That is correct.

Q. And that is the cannery that does not use Local 37 labor, is that correct?

A. That is correct.

Q. Now, if I understood your testimony correctly, in your view, at least if Local 37 were somehow cut out of the picture, the percent Filipino and other Asians would decline, correct?

A. It would decline gradually over the years. That doesn't mean that experienced workers wouldn't be rehired. I assume that they would.

Q. But, you're not able to predict the precise racial mix of those who would come in and fill those jobs, are you?

A. No, I am not.

Q. And at least some of those jobs would be filled, in your [sic] view, by non-whites who are not of Filipino or Asian descent, correct?

A. Correct, that is especially true in the Bristol Bay area.

\* \* \*

DISTRICT COURT

TESTIMONY OF ROBERT J. PLANAGAN

[p. 2064]

Q. Could you tell us what the correction is.

A. The corrections are in the second sentence of the second full paragraph. Five lines down, cross out the word "plaintiffs" and substitute the word "defendants." Two words before that, cross out the word "perform" and substitute the following phrase: Based on both the 47 percent figure, and the high and low estimates of availability developed. To be sure that's an insert, let me read the corrected sentence entirely just to be sure it's correct in the record. The second sentence. "Nevertheless, I note that statistical tests, based on both the 47 percent figure and the high and low estimates of



availability developed by defendant's expert Dr. Albert Rees, indicate that employment of non-white carpenters generally fell below the confidence interval at the Bumblebee, Red Salmon, Ekuk and Alitak canneries.

\* \* \*

[p. 2121(a)-(b)]

ROBERT J. FLANAGAN, being first sworn, states:

Attached is a document entitled Witness Statement of Robert J. Flanagan which summarizes my testimony in this case. I incorporate its contents into this affidavit by this reference.

WITNESS STATEMENT OF

ROBERT J. FLANAGAN

Associate Professor of Labor  
Economics and Director of the  
Public Management Program  
Graduate School of Business  
Stanford University

Stanford, California 94305

I. Qualifications and Background

My general expertise is in the area of labor economics. I have a B.A. degree from Yale University and an M.A. and a Ph.D. degree from the University of California at Berkeley. All of these degrees are in economics with a specialization in labor economics and include training in statistics and econometrics. I am also a member of the American Economics Association and the Industrial Relations Research Association.

\* \* \*

[p. 2121(c)-(d)]

Labor supply: The number of individuals who are available for work in a particular organization or industry. The most common empirical analog to this concept is the labor force which consists of the employed plus those who are looking for work in the industry but cannot find it (the unemployed).

Work force: this is usually a synonym for employment in an organization.

Seasonal work: work that occurs only part of a year but usually in about the same part (months or weeks) of each year. When seasonal work occurs in areas that are remote from major population centers, it usually requires the services of migrant workers.

Labor market discrimination occurs when individuals who have equal ability to perform a job but differ by race or sex (or some other characteristic that is

unrelated to their productivity) are treated differently in terms of pay or employment opportunities.

Occupational segregation: occurs when individuals of a particular race (or sex, etc.) are disproportionately employed in lower-wage jobs and underemployed in higher-wage jobs, given their qualifications.

#### Analysis for this Litigation

I was asked by an attorney for the plaintiffs in this case (1) to determine the percent of the labor supply to the defendant salmon canning companies that was nonwhite for the period since 1970, and (2) given the percent nonwhite in the labor supply, to determine whether there was discrimination in the allocation of jobs to nonwhites at the defendant canneries.

\* \* \*

Nonwhite Availability

The choice of a source of data that provides an accurate measure of the availability of nonwhites for work in the Alaska salmon canning industry is dominated by two unusual characteristics of employment in that industry: (1) employment is highly seasonal, since the canneries normally operate for only a few months in the summer, and (2) most of the canneries are in remote locations so that migrant labor is required. Seasonal, migratory work offers less job security and greater disruption to family life than do full-time, full-year jobs, and for these reasons it is generally less preferred. Judged by their job choices, most workers prefer full-year employment. Migrant, seasonal workers do not normally have full-year employment opportunities. Among the reasons for this is

discrimination in full-year employment opportunities. As a result, the nonwhite proportion of a migratory labor force is usually considerably higher than the nonwhite proportion of the full-year labor force in the areas from which a seasonal industry draws its workers, and it is inappropriate to estimate nonwhite availability to such an industry solely from the racial mix of the full-year labor force in those areas. Therefore, the basic problem confronted in measuring the availability of nonwhites for employment in the Alaskan salmon canning industry was to find a source of data that provided a clear indication of availability for seasonal migratory work.

With respect to statistics on labor supply, there were three choices. One is data from the 1970 Census of the Population. This source provides considerable data on the size and race



composition of the labor force disaggregated by geographical area, occupation, industry, and other characteristics, and for this reason it has been frequently used in determining availability or labor supply in Title VII litigation. However, this source has one fatal defect as a measure of labor supply for the Alaskan canning industry. The Census data are dominated by people in full-year, full-time employment. For most Title VII litigation, in which discrimination is alleged in organizations engaged in full-time, full-year operations and employment, the use of the Census of Population data is appropriate. However, it is inappropriate in the present case because a seasonal, migrant labor force tends to have a disproportionately large minority component. The use of Census data will therefore result in a substantial

understatement of the availability of nonwhites for work in the industry.

The second alternative is data on racial employment patterns developed and published by the Equal Employment Opportunity Commission from employment data on the EE01 forms submitted annually by many organizations. This source shares the flaw in the Census data, in that it is dominated by full-time, full-year employment, but has other debilities as well. There is, for example, much less occupational and geographic detail than is available in the Census. In addition, there are a number of shortcomings and biases in the data that are tied to the sample and data collection procedures and that the EEOC itself acknowledges in the volume in which the data are published.

The third and in my opinion the preferable alternative is a long statistical series on employment in the

entire Alaska salmon canning industry prepared first (from 1906 to 1939) by the U.S. Bureau of Fisheries and later (from 1941 to 1955) by the U.S. Fish and Wildlife Service. (These data are in Exhibits 61 and 62.) These data have the advantage of showing the racial composition of those individuals who actually choose to work in an industry characterized by seasonal, migrant work. In examining these data, I have considered three possible objections to their use. First, they provide information on industry employment, but the standard measure of labor supply, the labor force, includes the unemployed as well as the employed. The number of unemployed is usually a small fraction of the number of employed in a labor market, and, more importantly for the issues in this litigation, the unemployment rate of nonwhites generally exceeds the

unemployment rate of whites by a large margin. Therefore, if information on the unemployed were available, it is very likely that it would raise the estimate of the nonwhite percent of the labor force available to the Alaska salmon canning industry. The use of figures that are limited to employment provide a conservative estimate of nonwhite availability from the standpoint of the plaintiffs' interests. The second possible objection is that the data were not collected after 1955. This would be a particularly serious limitation if the percent nonwhite in the industry was highly variable over time or if it seemed to exhibit a particular trend. But in fact it was very stable. Over the last seventeen years that the series was published, the percent nonwhite stayed around 50 percent. The fact that employment at the defendant canneries in

this case, in the Domingo v. Nefco case, and in the Carpenter v. Nefco-Fidalgo case was also around 47 percent nonwhite during the 1970s indicates that the nonwhite availability to the industry has remained stable since 1955. The third potential objection to using this data source to estimate the nonwhite percent in the labor supply to the Alaska salmon canning industry is that the data do not include information on skill. In recognition of this problem, I have made adjustments for skill in my statistical analysis. The analysis and the adjustments will be discussed in the following section.

In determining the percent nonwhite available for work in the Alaskan salmon canning industry I have used the data from this third source for shoresman and transporters. (They are summarized in Exhibits 63 and 625.) In order to smooth

out minor annual fluctuations in the data, I have taken the average percent nonwhite for the last five years for which the data were gathered, 1951-55. The average percent nonwhite during those years was 47 percent. Because of the general stability in the figure over a much longer previous period, it appears to be an appropriate (although somewhat conservative, given the omission of unemployment) estimate of the percent nonwhite available for jobs in the industry that do not require extensive training.

#### Job Allocation Analysis

In order to reach an opinion concerning whether there was evidence of discrimination in the employment of nonwhites in the defendant's salmon canneries, I performed a statistical comparison of the percent nonwhite available with the percent nonwhite



employed in various job categories at the canneries. The standard of nondiscrimination that is used in the analysis is random selection, which means that each individual in the labor pool has an equal likelihood of being selected for employment. The purpose of the statistical analysis is to determine whether any difference that may exist between the percent nonwhite available to the Alaska salmon canning industry (47 percent, as noted above) and the percent nonwhite hired at any particular cannery is consistent with random selection in the allocation of jobs. In general, some difference between the two figures would be expected; that is, an individual cannery would not be expected to match the 47 percent availability figure exactly. This is because a single cannery hires only a portion (or, in statistical terms, a sample) of the industry's migrant,

seasonal labor force. Because a sample is only partially representative of the population from which it is taken, the characteristics of the sample (such as the percent nonwhite) are unlikely to match exactly the characteristics of the underlying population. Consequently, in the present case an employer's work force will not precisely reflect the racial mix of the industry-wide labor pool. However, the difference between the percent nonwhite employed by a cannery and the percent nonwhite available (47 percent) must remain within certain bounds to be consistent with random selection (i.e., nondiscriminatory hiring).

The nondiscriminatory range of nonwhite employment is determined by using standard statistical concepts of the normal variation in a characteristic such as the percent nonwhite associated

with random (nondiscriminatory) selection. More specifically, statisticians and economists frequently use the standard deviation, a measure of the normal variation of a characteristic around the average value of the characteristic, to construct a "confidence interval" which is the range around the availability figure (47 percent in the case of the salmon canning industry) in which the percent nonwhite hired is expected to fall most of the time if an organization is practicing nondiscriminatory hiring. The confidence interval that is regularly used in the social sciences is defined as plus or minus two standard deviations around the availability figure. (This is known as the 95 percent confidence interval.)

\* \* \*

[p. 2121(1)-(p)]

The interpretation of the results of the statistical analysis when hiring into a simple job is at issue is as follows. If the percent nonwhite selected by an organization falls within the confidence interval, the organization's selection process is consistent with random or nondiscriminatory selection. On the other hand, it is unlikely that an organization would select a percent nonwhite below the confidence interval if it were selecting randomly. In this situation discrimination is likely. When an organization practices occupational segregation, i.e., the restriction of nonwhite workers to low-wage jobs despite the ability of some to hold high-wage jobs, the employment of nonwhites will tend to fall below the confidence interval for high-wage jobs and may fall

above the confidence interval for low-wage jobs.

Before examining the results of my analysis of job allocation at the defendant canneries, it is necessary to address two further issues bearing on the interpretation of the results: (1) skill, and (2) the role of unions representing workers at the canneries. In analyzing the data for the defendant salmon canneries, I have considered adjustments that might be necessary for skill and other qualifications for employment in the industry. It appears that there are few (if any) written, objective qualifications for jobs at the canneries other than job descriptions that have been prepared for recent discrimination litigation, and the latter have been characterized as ideal criteria, rather than the criteria that are actually applied in hiring

decisions.<sup>[4]</sup> Most jobs appear to be unskilled or could be learned with a relatively brief period of experience in the industry. Nevertheless, a few jobs appear to have significant skill requirements, and there are others for which knowledge of skill requirements was lacking. Since the data that I have used to estimate availability does not include information on skill levels of whites and nonwhites, I have adjusted the internal employment data of the canneries to reflect skill requirements and/or uncertainty concerning skill requirements. Within some departments (e.g., machinist) there are a few jobs that appear to have substantial skill requirements. For those skilled jobs I assume that the only nonwhites who are qualified for the jobs are those who are actually hired. Operationally, this involves deducting openings for those



jobs from the total number of hires. The procedure is extremely conservative from the perspective of the plaintiffs, since it assumes the total absence of skilled nonwhites other than the few who were employed in skilled positions. The particular deductions for skilled jobs that I have made in my analysis are noted in Table 1. Once the openings for the most skilled jobs (and jobs where knowledge of skill requirements was lacking) were removed from consideration, the statistical analysis for the entire department, including both jobs which do and jobs which do not have significant skill requirements, could be conducted using the 47 percent availability figure.

I have also considered the possible influence of the unions that represent some employees in the industry. My general conclusion is that the content and implementation of collective

bargaining agreements in the industry leave employers with considerable discretion in their hiring and other personnel decisions and do not constitute a binding constraint.

The results of that analysis for each of the defendant canneries is presented in Exhibits 634-638, which have also been appended to this statement for reference. In each case the data have been analyzed separately for the periods 1970-80 and 1971-80. There are three columns of data for each of these time periods. The first, "Hires," gives the total number of positions filled (adjusted for skill as described above and in Table 1) and constitutes the value of "n" in the formula for the standard deviation. That is, each job in each year is treated as as a separate hiring decision, so that the "hires" figure is the cumulative employment over the time

interval under analysis, minus the employment of skilled individuals, as explained above. (Data on the number of white and nonwhite hires are from Exhibits 593-602.) The second column gives the actual percent of the positions that were filled by nonwhites and shows that nonwhite representation was highest in the low-wage positions and was generally low in the high-wage positions. The third column gives the 95 percent confidence interval for the percent nonwhite that would be expected to be if the hiring of whites and nonwhites was done randomly (i.e., without regard to race).

In all of the canneries, the hiring of nonwhites for the machinist, company fishing boat, tender, beach gang (except at Ward's Cove where the total number of hires was too small to perform the statistical test), and clerical positions

was significantly lower than would be expected if hiring were done without regard to race.<sup>[5]</sup> In two of the canneries, Wards Cove and Ekuk, the hiring of nonwhites for quality control jobs also fell below the confidence interval, and at Bumble Bee and Wards Cove, the hiring of nonwhites for miscellaneous jobs fell below the confidence interval.

In the case of carpenters, I was unable to construct a statistical test given considerable apparent ambiguity concerning the nature of the skill requirements for that position in the Alaska salmon canning industry. Nevertheless, I note that statistical tests performed by plaintiffs expert, Dr. Albert Rees, indicate that the employment of nonwhite carpenters generally fell below the confidence interval at the Bumble Bee, Red Salmon,

Ekuk and Alitak canneries. (These data are shown in parentheses in Exhibits 634-638.)

On the other hand, the employment of nonwhites in the lower wage positions of laborer and cannery worker generally fell above the confidence interval in the defendant canneries.<sup>[6]</sup> This overall employment pattern of exclusion from the high-wage positions and concentration in the low-wage positions at most of the defendant canneries is consistent with the employment pattern described earlier as occupational segregation. Moreover, the pattern is not explained either by skill, since skill adjustments have been made, or by other qualifications, which appear to be subjective in this industry.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF GARY P. LATHAM

GARY P. LATHAM, being first sworn, states:

[p. 2201(b)]

1. I live at 15260 Maple Wild Avenue S.W., Seattle, WA 98166. I am an industrial psychologist. I have a Ph.D. in Industrial Psychology, an M.S. in Industrial Psychology and a B.A. in Experimental Psychology. I currently have a half-time appointment in the Business School at the University of Washington and I have my own private practice. I teach the senior level course in performance appraisal and I supervise the research of doctoral students. I also do individual seminars on employee motivation. . . .

\* \* \*



[p. 2201(c)]

5. In 1978 I was appointed court monitor in Domingo, et al., and Kookesh, et al. v. New England Fish Company, W.D. 713-73 C2. In that capacity I reported to the court on certain employment practices of New England Fish Company in three of its Alaska salmon canneries. I also made an assessment of qualifications for certain jobs at issue in that case. I was selected jointly by the parties in that case. I was paid for my work by New England Fish Company by court order. My role in that case was that of a neutral party.

\* \* \*

[p. 2201(g)]

19. I have based my conclusions in this case on a combination of the following sources of information: (a) the Monitor's Final Report which I prepared in Domingo v. New England Fish

Company, (b) depositions of job incumbents and cannery supervisors, and (c) defendants' interrogatory answers and job duties where noted.

20. The beginning point of my work in this case was the monitor's report which I submitted in the New England Fish Company case in 1978. I took the following steps in performing my study of job qualifications in that case. First, I read background material supplied to me by the attorneys for all parties in that case. I then prepared structured interviews which contained the questions I intended to ask incumbents and supervisors. I reviewed the structured interview with attorneys for all parties in that case. Attached is a copy of Exhibit 639 [Note: This table is included in the Excerpt of Record] which is an excerpt from my report in that case. . . .

[p. 2201(h)]

21. I then prepared checklists of possible job duties for a number of jobs. For the most part I used material prepared by the defense expert in that case. I reviewed these checklists with incumbents and supervisors to find out whether any duties were missing. I also asked supervisors and incumbents to delete noncritical duties.

22. I conducted interviews during the 1978 season at the canneries. I conducted some during the preseason as well. I promised each interviewee confidentiality before the interview. The interviews were conducted in quiet, isolated places. No lawyers or company personnel aside from the interviewee were present. Throughout the interviews I took notes on each interviewee's responses.

23. In Seattle I analyzed and integrated the results of the answers. I drew conclusions where there was uniformity in responses at the level of  $n$  minus 1. That is, if I interviewed 5 people regarding a job, then 5 was  $n$ . If at least of them ( $n$  minus 1) agreed on a job duty or period of learning time, I relied on their answers. If less than 4 agreed, I did not rely on their answers.

24. The conclusions I drew were reported in the Monitor's Final Report. Pages 22-34 of Exhibit 640 are excerpts of the report which reflect my conclusions both as to critical job duties and learning time. The listing of critical job duties forms a job analysis for the pertinent jobs.

[p. 2001(i)]

25. In the Monitor's Final Report I stressed that I did not perform an independent job analysis. The words

"independent-dependent" are not synonymous with such words as good-bad. The term independent refers to the fact that the questionnaire was based primarily on the listing of job duties prepared by Nefco's expert witness, Arnold Gibson. Gibson's listing was labelled excessive or ideal by Judge Solomon. My preliminary work during the 1978 cannery preseason indicated that the listing was, indeed, exhaustive in that it contained every conceivable job duty that might possibly be performed by a job incumbent without taking into account necessity or frequency. My job analysis was thus "dependent" upon the comprehensiveness of the job duties initially prepared by Gibson.

26. In this case I also relied on material I reviewed in the Nefco-Fidalgo case. It is established practice in psychology to consult sources of

information concerning similar jobs in the same industry. This is especially true where the sample size for a given job (e.g., salmon butchering machinist) in a company is small.

\* \* \*

[p. 2201(j)]

28. In July, 1980 as part of my study in this case I sent my assistant Lise Saari to three Alaska salmon canneries run by defendants to interview incumbents and supervisors. Ms. Saari is a doctoral student who assisted me in my work as monitor.

29. I gave diminished weight to the results of interviews that Ms. Saari conducted there. In my professional judgment, the circumstances of these interviews make the responses of incumbents questionable. First, a grant of confidentiality to the interviewees was impossible because defense counsel



was present. Second, defense counsel spoke with nearly every interviewee prior to the interview. Some of the interviewees were deposed after July, 1980. I attended these depositions. However, I felt that because the interviewees had already committed themselves to one position in Alaska, their deposition responses would be similarly suspect.

30. The jobs I examined in this case are first machinist, seamer machinist, can shop or reform machinist, filler machinist, salmon cook, salmon butchering machinist, machinist helper or trainee, quality control, dry tender engineer and beachman. In examining machinist jobs I also reviewed the duties entailed in the cannery foreman's job.

31. In reviewing material in this case I tried to focus on who was responsible for the difficult repairs.

For example, at Nefco the cannery foreman and first machinist were involved in major repairs on the cannery machinery. They were highly skilled people whose duty it was to supervise and assist the other machinists in the more technically demanding work. This meant that the other machinists operated primarily as machine operators and -- to some degree -- as maintenance mechanics. The cannery foreman and first machinist may well be true machinists but the other machinists are generally not. In my view -- to use the words of a Nefco-Fidalgo cannery foreman -- "A machinist is someone who can run a lathe, run a milling machine, all the shop equipment, and weld, and fit bearings, and heat treat parts, whatever." "A cannery machinist isn't. A seamer machinist, a fillerman is not a general machinist." Similarly, at Nefco major repairs on the tender engines were

formed by the port engineer or during the winter months in Seattle. This relieved dry tender engineers of the need to know how to perform major repairs on the engines.

[p. 2201(k)]

32. I compared the depositions and witness statements listed above with my findings in the Monitor's Final Report. A summary of the information in the depositions and witness statements is contained in the attached Tables 1-7. The only substantial discrepancy between the Monitor's Final Report and the information contained in many of the depositions and witness statements is that the former contain a larger number of job duties than the latter. This may be explainable by the fact that the questionnaire I used as Monitor was not shown to these people. It is likely that a questionnaire might facilitate [sic]

recall. What is significant is that the learning times reported by respondents to perform adequately on the job are approximately the same regardless of cannery and regardless of whether the respondents were shown the Gibson-based questionnaire.

33. I have concluded that the views I expressed in the Monitor's Final Report are applicable to the jobs I studied here. In large part this is because skilled personnel such as cannery foremen, first machinists, tender captains and port engineers assist incumbents in the jobs at issue. As I discuss below the material in Tables 1-7 is buttressed by the listing of job duties in defense interrogatory answers.

\* \* \*

DISTRICT COURT

TESTIMONY OF RONALD BACLIG

[p. 2206]

RONALD BACLIG, being first sworn, states:

1. My address is Route 4, Box 4352, Wapato, Washington. I am of Filipino descent. I work as a supervisor for Ross Packing Company in Selah, Washington. I was employed as a cannery worker by Wards Cove Packing Company, Inc. at Red Salmon Cannery in 1971-2.

\* \* \*

[p. 2207]

3. In 1972 with some other non-whites I tried to go to a mug-up at the white messhall. The cook turned us away saying that we did not have any business over there. He said that we had our own messhall which was where we should eat.

\* \* \*

DISTRICT COURT

TESTIMONY OF ALAN LEW

[p. 2214]

ALAN LEW, being first sworn, states:

1. I am a male of Chinese descent and am a plaintiff in this case. I graduated from Cleveland High School in Seattle in 1971 and entered the University of Washington in summer quarter of that same year. I graduated from the University of Washington in 1975 with a B.A. in architecture. I am presently employed with the Department of Defense as an Architect and Interior Design Consultant with a G.S. rating of 12. I am responsible for architecture and interior design of projects for fourteen Air Force bases located throughout the United States. . . .

\* \* \*



[p. 2220]

12. I was not aware of any job progression in the cannery. There was no posting of jobs by the company. I did not know how the defendants employed mechanics, fishermen, warehousemen, or members of the beach gang. On an informal basis I tried to determine how to apply for those other jobs that were "white" within the cannery operation. Part of the difficulty was trying to understand the system. Since we were never privy to the system, we could not apply for those "white" jobs. It was my impression, based upon observation and conversations with occupants of quality control, tenderman, and bookkeeper positions that I would have been fully qualified to perform any of these jobs. Instead, I remained a cannery worker and was likewise required to perform less safe and more difficult and degrading work. . . .

\* \* \*

[p. 2221]

13. I was fed, housed, and worked around strictly non-white personnel. Housing was segregated between white and non-white; social groups were generally segregated along racial lines. A Filipino foreman supervised the non-white crew; a white foreman or supervisors supervised white crews. There were separate messing facilities for white and non-whites. I had the impression that these positions were set, and there was no way for me to take any other positions--I was up there for a limited period of time within the cannery environment, socially I felt compelled to play by their rules essentially. To me, it was the first time that I was exposed to prejudice. I came from a family that I considered average middle-class and in the cannery I was being treated differently, receiving a

different diet, and essentially no respect, solely by reason of my race.

\* \* \*

DISTRICT COURT

TESTIMONY OF CHERYL TATOM

[p. 2233]

CHERYL TATOM, being first duly sworn, states:

\* \* \*

[p. 2233]

. . . I was involved in the preparation of Exhibits 583-624 and 751.

\* \* \*

[p. 2261]

Q. (By Mr. Duncan) Would you take a look at Plaintiffs' Exhibit 603? This is a list of Bumble Bee employees who are related to each other.

Mrs. Tatom, with respect to the persons that might have been married, how did you go about determining whether they were married as opposed to being blood relations?

A. I didn't.

Q. All that you had was that two people were related together, whether by blood or by marriage?

A. Right.

Q. Did you make any effort to determine how many of those persons who were married actually met at the cannery and got married subsequently?

A. No, I didn't.

\* \* \*

[pp. 2262-2263]

Q. As I understand it, any instance in which a cannery worker is related to another cannery worker, they are just totally excluded?

A. That's right.

Q. Now, in both 603 and what I'll call the underlying exhibits, 603 through 609, employees who are related to each other year after year are both counted as being persons who are related or, as

Plaintiffs will argue, nepotistic hires; is that right?

A. That's right.

Q. So for instance, on Page 1 of Exhibit 603, you have Item No. 1, Ervin Puffinberger related to Donald Puffinberger. Then we go on to 1981, which is Page 95, Item No. 2, you have Ervin Puffinberger as a relative of Donald Puffinberger.

That sort of thing goes on all the way through these exhibits; isn't that right?

A. That's true.

Q. Now, you have counted as related people persons who were employees being related to people who were not employees; i.e., independent fishermen; isn't that right?

A. That's right.

Q. Did you make any effort to determine whether anyone was related to



any other independent contractors, such as airline pilots or anyone like that?

A. No.

\* \* \*

[pp. 2263-2264]

Q. (By Mr. Duncan) Mrs. Tatom, did you do the summaries in 610 through 6 -- I believe the summaries are 608 through 612.

Now, let's take for instance the example of Mr. Puffinberger on Page 1, Item 1 of 603. You counted both ends of that relationship as nepotistic hires; isn't that right? In other words, you counted one for Ervin and one for Donald?

A. That's right.

Q. Isn't it more logical that you would only count one of them as having been nepotistically hired, so to speak, rather than both of them?

A. It could have been done that way, I suppose.

\* \* \*

[pp. 2264-2265]

Q. . . . Individuals who worked on tenders who were counted as being related to a person at Wards Cove, and then they are on a traveling tender and go down to another cannery, they are counted again in that same year; isn't that right? They would be counted, both people counted two times at each cannery?

A. If they are listed on Interrogatory 25 as being employed by both canneries, then, yes, they would be counted at both canneries.

Q. You have no information that any of these people were hired because they were related, as opposed to what their qualifications or background or experience were; isn't that right?

A. Would you repeat your question, please?

Q. You have no information that -- as to whether or not these people were hired because of their relationship rather than just because of their qualifications?

A. No.

Q. You have no information whether these people simply heard about the cannery, came up and got hired, rather than got the job because a relative got it for them; isn't that right?

A. I don't understand. I don't understand the question. I mean, I don't know why they got hired, no. I have no idea why they got hired.

\* \* \*

[p. 2268]

Q. Just one further question about the traveling tenders.

If someone is hired at Wards Cove-- hired at Red Salmon one time and that tender goes down to Wards Cove, that's

another count. And if that person is related to, say, A. W. Brindle in both instances, A. W. Brindle is counted twice even though it's the same company?

A. The year--the supervisors are only counted once. See if I can think of--I think John Gilbert is one. A. W. Brindle is one.

Q. Is A. W. Brindle counted one time at Wards Cove and one time at Red Salmon?

A. Yes, he would be.

\* \* \*

[p. 2269]

Q. Two Brindles at Red Salmon who are related. Then they go down, both of them on the same tender, down to Wards Cove. Are they both counted again?

A. Yes. They are on Interrogatory 25 at both canneries. They are counted at both canneries.

\* \* \*

DISTRICT COURT

TESTIMONY OF CHARLEY ANDERSON

[p. 2347]

1. My name is Charley Anderson and I reside at 2427 Inga Street, Anchorage, Alaska.

2. I am an Alaska Native.

\* \* \*

3. I was raised in the Naknek area and have been around Bristol Bay canneries since I was a youngster. I will be 62 years old next week. . . .

\* \* \*

[p. 2348]

6. In the late 1960's, there were between ten and twelve Native company fish boats. There were two men to a boat. Currently there are about six Native independent boats and several setnetters fishing for the Red Salmon cannery. There are about ten or twelve Native

independent fish boats based at Egegik, a fish camp that is associated with Red Salmon.

7. I have never encountered a problem obtaining a leased fish boat from the Red Salmon cannery. As a matter of fact, I have sometimes been leased the boat at no cost. (See Plaintiffs' Exhibit 437 attached.) I am not aware of any Native fishermen who requested a market and were denied.

\* \* \*

[p. 2350]

13. In the preseason when the number of people at the cannery is small, all of the workers eat their meals in the Blue Room in the main mess hall. This is the only mess hall and dining room that is open at this time. Everyone, including the cannery superintendent, office workers, crew foremen, machinists, beachgang, carpenters, and port engineers



eats [sic] their meals in this dining room. The persons eating in this dining room have been a mixed racial group, including whites, blacks, Alaska Natives, and Filipinos.

14. When it is close to the time that the fish begin running and there are more people in camp, the larger dining hall in the main mess is opened. My crew, I, and many members of the other crews that had been eating in the Blue Room, transfer to the larger dining room in the main mess hall. Persons who eat in this mess hall include my crew, beachmen, sometimes tendermen, female cannery workers, and all of the fishermen. This group is also a mixed racial group. As long as I can remember, there has been a free choice of seating in this dining room during the first week. Then, everyone pretty much settles into sitting at the same seat every day. People like to go to

the same seat so that they know that a seat will be available every meal, set [sic] with friends, and that they don't have to make a mad rush to get the spot they want in the dining room.

\* \* \*

[p. 2350]

15. I am very familiar with almost all of the people who live in the Naknek River Basin. I know of no people who are qualified canning machinists.

\* \* \*

[p. 2351]

16. During the years that I have worked at Red Salmon (about 1942 through the present), I feel that everyone has been treated equally and fairly.

\* \* \*

[pp. 2354-2356]

Q. You don't know specifically what qualifications are imposed for canning machinist's jobs, do you?

A. No, I don't.

Q. So what you mean in Paragraph 15 is simply that you don't know of any people who live in the Naknek River Basin who are employed as cannery machinists; is that right?

A. That's right.

Q. Now, to your knowledge, are there quite a few Alaska natives, say, in the Bethel area who are qualified to work as company fishermen?

A. Well, there is some up there that could be qualified for company fishermen.

Q. How about in other coastal regions of Alaska? Are there other Alaska natives who are qualified to be company fishermen?

A. As a company fisherman?

Q. Right.

A. Yes, there is.

Q. In fact, quite a few Alaska natives grow up around boats; is that correct?

A. Well, they have to grow up around boats, yes.

Q. That's true in the Bethel area?

A. Yes.

Q. It's true in other coastal regions?

A. Yes.

Q. Many of them make a living doing subsistence fishing, too; isn't that correct?

A. Subsistence fishing?

Q. Right. They fish to--they live off of what they fish, right?

A. That's right.

Q. Now, you had a crew in Red Salmon for quite a while; is that correct?

A. Yes.

Q. That's mostly Alaska natives, isn't it?

A. Yes.

Q. They did the same work as the beach gang, didn't they?

A. Yes.

Q. Now, does Red Salmon have any Eskimo cannery workers today or in the current seasons?

A. In the cannery workers?

Q. Eskimo cannery workers, right.

A. No.

Q. You have to answer out loud.

A. I don't get what you're--

Q. Okay. Let me ask it again. Say in the 1981, did Red Salmon have any Eskimo cannery workers?

A. Not as I know of.

Q. In previous years, they did have Eskimo cannery workers?

A. Yes.

Q. Those Eskimo cannery workers were fed in a separate dining hall, weren't they? Separate dining rooms?

A. Yes.

\* \* \*



**DISTRICT COURT**

**TESTIMONY OF ROBERT KRAPP**

ROBERT KRAPP, being first duly sworn, on oath deposes and says:

[p. 2370]

1. I live at 13821 Beverly Park Road, Alderwood Manor, Washington. I have been an employee for Wards Cove Packing Company, Inc., since 1960 and have the stockman at the Red Salmon cannery since the 1967 season. . . .

\* \* \*

[p. 2380]

47. During the preseason, everybody at Red Salmon ate in the same mess hall. This was the main mess. In all the years I have been at Red Salmon, I have never heard this mess hall referred to the "white mess hall" or "white man's mess hall." It has always been called the mess

hall or the main mess or the fishermen's mess.

48. Those that are at Red Salmon are of mixed races. The minority machinists referred to above as well as the spring and fall workers, many of whom are Alaska Natives, all eat there. In fact, the earliest crews, including the Natives who work on Charlie Anderson's ways crew, eat in the Blue Room. As we got more people into the cannery, we would expand out into the main fisherman's dining room. During the season the superintendent, guests, the machinists, carpenters, and office people eat in the Blue Room.

49. It is not until the Local 37 cannery workers arrive that the other mess hall is opened up. Once the Local 37 cannery workers leave, everyone once again eats in the main mess hall.

50. Although I have liked the food at Red Salmon pretty well, I have always heard a lot of grumbling and griping about the food, especially when we are not canning at all and people were bored, or when we were canning heavily and people were getting tired and irritable. This is just human nature. The cooks could never seem to please everyone: "the food is too heavy," "there is not enough fruit," "there is not enough variety," "there is too much gravy," "there is not enough gravy," etc. I remember in 1977 that we got so tired of the food in the main mess that we circulated a petition to have the cook fired. Although this cook, Ed Faust, was a good baker, he served us cabbage with virtually every meal for what seemed like eternity.

51. The whole time I have been at Red Salmon, fresh fruits and vegetables have been very difficult to come by. The

only fresh fruit we ever saw was what came up on the tenders from Seattle. This was almost exclusively apples and oranges and we didn't get those all that often. It was once in a blue moon that we get to see a head of lettuce.

\* \* \*

[pp. 2383-2384]

Q. Now, your first job for either Wards Cove Packing Company or Columbia Wards Fisheries was as a tender cook, wasn't it?

A. Yes.

Q. Prior to getting that job, you had not had any professional experience working as a cook, had you?

A. No.

Q. Now, you mentioned in your affidavit that you were in the Coast Guard?

A. Yes.

Q. While you were in the Coast Guard, you worked in a control tower at Ketchikan; is that right?

A. That's right.

Q. You didn't work on boats then, did you?

A. No.

Q. So the job that you had on a tender your first season was your first job working on a boat, wasn't it?

A. Yes.

\* \* \*

[pp. 2384-2385]

Q. You worked for Wards Cove Packing Company as both a tender cook and as tender cook/deckhand, didn't you?

A. Yes.

Q. When you held those jobs, you only cooked for the tender crew didn't you?

A. — That's correct.

Q. How many people were there?

A. Four, including myself.

\* \* \*

[p. 2385]

Q. So the major work on the tenders, major repair work is done in the yard before they go to Alaska, isn't it?

A. Yes.

Q. One of the functions of the employees at Lake Union Terminals is to insure that the boats are in good working order before they make the trip north, correct?

A. Correct.

Q. Isn't it fair to say that it's rarely, if ever, are there major problems on the tenders up north in Alaska?

A. That's something you can't predict.

Q. It's pretty rare, though, isn't it?

A. It's happened, but it's rare.

\* \* \*



[pp. 2386-2387]

Q. Now, in the years that you've been at Red Salmon, there have been two mess halls during operating years, haven't there?

A. Yes.

Q. Can you tell me what those are called?

A. We call the mess house the mess house and the other mess house has always been called the Filipino mess hall.

Q. Now, the cooks who cook, though, for that mess hall, where do they live?

A. For the main mess hall?

Q. No, no. For the other one. Where do they live?

A. They must live over to the cannery workers mess house or bunkhouse.

Q. Is that bunkhouse ever called the Filipino bunkhouse?

A. Certainly.

Q. Now, I understand from your affidavit that the cook for the main mess hall lives in the Fish Inn; is that correct?

A. The cooks, yes. But the steward, I don't think so. The steward is Filipino. He stays over with the Filipinos.

Q. Is the cook white, then, as opposed to the steward?

A. We have had. I have no idea what they have this year. I think we have a colored cook this year.

Q. Last year, he was white?

A. White, yes, sir.

Q. And he stayed in the Fish Inn?

A. Right.

Q. The steward stayed in the?

A. Cannery worker.

Q. Okay. Now, some years at Red Salmon in the past you used to have Eskimo cannery workers, didn't you?

A. Years back, in the early sixties.

Q. In fact, through the early seventies, too, didn't you?

A. No, I don't think so. I think in the late sixties was the last we had.

Q. Where did they live in the cannery?

A. They had their own bunkhouses.

Q. Do you know why they had their own bunkhouses?

A. It was there when I came. It was tradition, I guess.

\* \* \*

[p. 2389]

BY MR. DUNCAN:

Q. What were your qualifications to be a tender cook?

A. I could cook. I cook for my family.

Q. Why did you cook for your family?

A. My wife worked days and I worked nights. So I cooked for the children at home. Fixed the evening meals.

Q. Pardon me?

A. I say I fixed the evening meals.

Q. For the whole family?

A. Right.

Q. For how long?

A. Oh, that went on for five or six years.

Q. Before you became a tender cook?

A. Uh-huh.

\* \* \*

DISTRICT COURT

TESTIMONY OF RICHARD QUIRION

RICHARD QUIRION, being first duly sworn, on oath deposes and says:

[p. 2393]

1. I live at 8707 Northeast 88th Street, Vancouver, Washington 98662. I worked for Wards Cove Packing Company at its Wards Cove, Ketchikan cannery from 1978 to 1981.

\* \* \*

[p. 2393]

2. I was hired in 1978 as first cook for the Upper Mess. I am one quarter American Indian. I neither experienced nor observed any incident of racial discrimination while I was at Wards Cove. I felt that Joe Brindle and Jerry Steele were fair in their management of the cannery.

\* \* \*

[p. 2395]

10. Jerry Steele told me not to turn away any employee who wanted to eat in my mess. I never turned away anyone who wanted to eat in the Upper Mess. . . .

\* \* \*

[p. 2405]

Q. Were you ever up in the kitchen in the lower mess hall?

A. Yes, I was.

Q. Did you ever hear the lower mess hall referred to as the Filipino mess hall?

A. Some people called it that, but I never did.

Q. Did only Filipinos eat there?

A. Uh-huh. As far as I know.

\* \* \*



DISTRICT COURT

TESTIMONY OF EBERLE MERCER

[p. 2541]

1. My name is Eberle Mercer and I reside at 5221 La Jolla Hermosa, La Jolla, California.

\* \* \*

[p. 2542]

7. Since about 1975 I have been chef/steward at the Alitak cannery during the summers and during winters a ship's cook on tuna vessels based out of San Diego, California.

\* \* \*

[p. 2542]

8. Since I have been employed at the Alitak cannery as chef/steward the food supplies for both the winter mess hall and summer mess hall have been equally accessible to both messes.

9. As a matter of course Oriental foods are more expensive in the Seattle area than American-style food pound-for-pound and dollar-for-dollar. It has been my experience that the chief cook of the summer mess hall has made an order prior to the season of the foodstuff he requires, submitted that order to the cannery office in Seattle, it has been purchased, and supplied to him.

\* \* \*

[p. 2542]

10. Prior to the 1980 fire, a summer mess hall and a winter mess hall were operated at Alitak. The summer mess was basically Oriental cuisine. The winter mess hall served basically camp-style "Alaskan supply" food.

11. Mainly those persons under ILWU jurisdiction ate in the summer mess hall. All others ate in the winter mess hall. However, it was the practice to permit

persons who requested and informed the cook, in advance, to eat where they saw fit. I do not recall refusing anyone who came over from the summer mess hall to sit and eat in my mess hall. The summer mess hall had the same policy. The persons who ate in my mess hall, over the years, have been a mixed racial group, including whites, Latinos, Alaska Natives, Japanese, and some Filipinos.

\* \* \*

[p. 2546]

Q. Did you ever observe anyone eating in the summer mess hall?

A. Frequently.

Q. But you can't tell what race they were?

A. I don't know exactly what race they were. They were a mix.

Q. A mixture? Would you say they were more or less white?

A. I would say less.

Q. How about with respect to the mess hall which is denominated the winter mess hall? That's your mess hall?

A. That is correct.

Q. Subsequent to 1975 and previous to 1980, would you say that that mess hall, that the people who were fed in that mess hall were predominantly white?

A. I would say so, yes.

\* \* \*

DISTRICT COURT

TESTIMONY OF EARL ANDERSON

[p. 2625]

EARL ANDERSON, being first duly sworn, on oath deposes and says:

\* \* \*

[p. 2625]

1. I live at 4615 Leif Erickson Drive in Astoria, Oregon. I am presently the carpenter/shipwright foreman at the Bumble Bee Seafoods cannery in South Naknek, Alaska. I have been the foreman since about 1967. From about 1960 through 1965 I was a carpenter and shipwright for Bumble Bee during the summers at South Naknek. I was a company fisherman for Bumble Bee from about 1952 through about 1965, when I became an independent fisherman. I continued to fish for Bumble Bee through the 1980 season. I hope to fish again this coming season.

\* \* \*

[p. 2627]

8. My crew starts work the day after they arrive at South Naknek, usually in early May. Any major work that has to be done to the tenders or fishing boats by my shipwrights must be done before the season starts, which is only about month or so after we arrive. Therefore, my shipwrights must know how to do the job right the first time because there just isn't enough time to do the same job over and over again before the fish start running. This is also true of the more traditional carpenter-type work that is done. My crew only has about three months to get one year's worth of construction, maintenance, and remodeling work done. We work at a pretty fast clip and have to do our work well so that the buildings will withstand the harsh Bristol Bay winters. Exhibit A-161(119)-



(125) show some of the damage that heavy snowfall did to some of the buildings a few years ago.

9. Because of our location, we do not have ready access to building materials. This means that for all practical purposes, what we take up to South Naknek with us is all we have to work with. My crew is, and must be, very conscious of conserving materials. We really cannot afford to have people wasting materials or doing sloppy work that has to be redone because once the materials are gone, we may not be able to get anymore. Sometimes we can get extra materials from other canneries or by flying them in, but this takes extra time that we usually do not have.

\* \* \*

[pp. 2627-2628]

10. I cannot think of a single carpenter or shipwright that I have had on

one of my crews at Bumble Bee who did not have previous work experience as a carpenter or shipwright. We have hired only a few people (Henry Koski, Jr., and Les Stone come to mind) who were not already journeymen, but these men were almost finished with their formal apprenticeship programs and had at least a year of on-the-job experience in addition to work they had done before they had entered their apprenticeships.

11. We do not run a "school" for unskilled or inexperienced persons who want to become carpenters or shipwrights. We couldn't do this even if we wanted because of the limited amount of time and personnel we have. Everyone in my crew has his own work to do and we don't have time to give step-by-step guidance to inexperienced, unskilled people.

12. My shipwrights work on company and privately owned fishing boats. The

private owners spend \$25.00 and up per hour to have their boats fixed. They do not want a green man "being trained" on their boats at those rates. If the work had to be redone, they would refuse to pay it and the company would have to absorb the cost. It is simple economics that the shipwrights have to be skilled before they ever get to Alaska.

13. Although the superintendent has the final say in hiring the people on my crew, I have made recommendations. I have never recommended anyone who did not have previous carpenter and/or shipwright experience. I do not recommend persons without such experience because I do not believe they could do the job.

14. I do not think someone who was just familiar with common hand tools, even if he had carpentry experience, would be of much use to us at the cannery. This is because we use almost entirely

power tools and you need experience with them to use them effectively and so that you don't hurt yourself or somebody else. I do not think someone who was familiar with home shop-type power tools and common hand tools would be qualified to work on my crew, even doing some of the light maintenance work unless he had some work experience in the field. Such a person would also not be qualified to be a shipwright. Carpentry and shipwright work are skilled trades and take skilled people to do them.

\* \* \*

[p. 2630]

20. All of the members of my crew usually eat in the main or lower mess during the time we are at South Naknek. During the preseason, everyone who is there (i.e., all the noncannery workers) eats in this same mess hall. Once the cannery workers come in just before the

fish start running, the cannery opens up another mess hall where they eat. The female cannery workers, several of whom have been Asian, usually eat in the main mess during the years that I have been at South Naknek. John Lum eats in the main mess and he is Chinese. Ray Gomez, the new office manager, is Filipino and he eats in our mess.

21. In 1973, a poor season, our cannery crew was much smaller than normal. Because of this, the small (or upper) mess hall was not used that year and everyone at the cannery, including all of the cannery workers, ate in the main mess hall. Occasionally, towards the end of some seasons when many of the fishermen have gone home, the small (upper) mess hall was closed early, and everyone who was eating in that mess hall was transferred to the main (lower) mess hall for the remainder of the season.

22. Currently, we are doing work to the main mess hall and our preseason crew is eating its meals in the small (upper) mess hall.

23. Over the years I have often been invited by the cook to eat meals and attend coffee breaks in the small mess hall. I have found that the quality of the food served in the small mess hall to have been the same as that served in the main mess hall.

24. As long as I can remember, the small mess hall has had one white cook and one cook of Filipino descent.

25. Since the addition of the cold storage facility, cold storage workers have eaten in the small mess hall. They were a mixed racial group.

26. Sometimes, at the peak of the season, the cannery will bring in workers from the Air Force base at King Salmon. Depending on which mess hall has the most



room at the time, they ate either in the main mess or the upper mess. These men are a mixed racial group.

\* \* \*

[p. 2632]

BY MR. ARDITI:

Q. Mr. Anderson, you do not make any hiring decisions for Bumble Bee, do you?

A. No, I do not.

\* \* \*

DISTRICT COURT

TESTIMONY OF FRANK SHUCKA

[p. 2736]

1. My name is Frank Shucka and I reside at Star Route, Box 272, Carlton, Washington 98814.

\* \* \*

[p. 2738]

12. Throughout my years as a captain, I have mostly hired my own crew. Although I have never exercised it, I probably had veto power over anyone hired by the company to be a crewman on my vessel. If I had not had veto power, I would not have continued to work for the company. The company has never vetoed anyone who I have hired. I consider crew compatibility to be very, very important, especially on a briner where we spend five months together in confined quarters. . . .

\* \* \*

[p. 2756]

Q. Now, your wife Diane has worked with you as tender cook on your tender, has she not?

A. That's right.

\* \* \*

[p. 2756-2758]

Q. I want to call your attention to the first year that she worked as tender cook, okay? Prior to that time, you and she had run a malt shop, had you not?

A. That's right.

Q. She was not the cook at the malt shop, was she?

A. No, sir.

Q. But she worked around the malt shop?

A. We all cooked at some time or another.

Q. Now, that was, in fact, the only professional cooking experience that she'd had before she became a tender cook, correct?

A. Professional, yes.

Q. Now, you have a son who is also named Frank, don't you?

A. Yes, sir.

Q. Has he worked on any tenders for Columbia Wards Fisheries?

A. Yes, sir.

Q. In fact, he started--strike that.

Was his job as a deckhand initially?

A. Yes.

Q. Did he first have a deckhand job at age 17?

A. I'm not sure of the age.

Q. Was it around age 17?

A. Somewhere around. 17 or 18.

Q. Now, had he been with you on any oyster dredges before that?

A. Yes.

Q. But he was not an employee, he was simply accompanying you, correct?

A. That's correct.

Q. Now, he had not had any prior marine work experience before he became a tender deckhand, had he?

A. No.

Q. Now, how big is your family?

A. Five.

Q. Do you have another son named Walter?

A. That's right.

Q. Has he worked for Columbia Wards Fisheries on a tender?

A. Yes.

Q. What job did he start at?

A. Deckhand.

Q. How old was he when he started as a deckhand?

A. I'm not sure of that age either. But somewhere--17 or 18.

Q. Now, after he was a deckhand, he became a tender engineer, didn't he?

A. Yes.

Q. He was about 18 at that time, wasn't he?

A. No. He had been with me for two or three years and then I think he went as an engineer at Wards Cove on one of the small dry tenders.

Q. Is that the ROWITA?

A. Yes.

Q. Isn't it true that prior to obtaining his job as tender engineer on the ROWITA, your son Walter had not had any prior mechanical work experience?

A. Only as deckhand on the dry tender that I was running.

Q. Now, Walter eventually became a tender captain, didn't he?

A. Yes.



Q. Was that for Columbia Wards or Wards Cove?

A. Wards Cove.

Q. In fact, he became a tender captain at age 21, didn't he?

A. I'm not sure of the age. Somewhere around there.

Q. Now, you're not aware of any written qualifications for tender jobs, are you?

A. No, sir.

Q. I gather that you've hired three of your own family members on your tender, correct?

A. At different times. Never all at the same time.

\* \* \*

DISTRICT COURT

TESTIMONY OF JAMES W. YONKER

[p. 2827]

JAMES W. YONKER, being first duly sworn, on oath deposes and says:

\* \* \*

[p. 2829]

9. In May of 1976 I became aware that Bumble Bee Seafoods was interested in training an assistant superintendent for Warner Leonardo and there was an assistant superintendent job available. I applied for that job and started in that position in May of 1976. I have continued as assistant superintendent for Bumble Bee to the present date.

\* \* \*

[pp. 2831-2832]

15. In terms of qualifications I feel that the minimum is that an applicant must have experience in one or more of the

following areas before he is hired: carpentry, welding, pile driving (there is much ice damage in Bristol Bay during the winter time), rigging, splicing wire rope and rope, operation of heavy equipment, and construction.

\* \* \*

16. It is our policy to provide a room with a bed, pillows, towels, linens (clean linen once a week), heat, a window, showers, a washroom, facilities to wash clothes and protective clothing to every employee employed by Bumble Bee. The men and women are segregated for reasons of privacy.

17. Employees are assigned housing according to the length of the time at the plant, by the time of arrival, and, to a large extent, by their crew.

18. The assignment of bunkhouses depends, to some extent, on the weather. Early May can be very cold in Bristol Bay

and sometimes all the preseason employees end up in one bunkhouse.

19. The preseason employees such as the cooks, the machinists, the carpenters, and the beachgang arrive on or about May 5th and are assigned housing then. The cannery workers arrive about June 15th.

20. I feel that it is ridiculous to have the early season crews settled into their bunkhouses and then ask them to pick up and move for three weeks when the cannery workers and the cold storage workers come in. It would also be totally unfair to everyone to have a complete hodge podge of crews in the housing because you would virtually guarantee sleeping disruptions every day which would cause a lot of friction between people who are extremely tired and irritable as it is. I cannot believe that the plaintiffs really want this.

21. In 1980 we opened the operation of the cold storage facility and this added about 75 employees to the Bumble Bee cannery. The women working in the cold storage were at first housed with the cannery worker women. It was very unfair to both groups. We had about 40 of each and sometimes the cold storage women would get up at 4:00 in the morning but the cannery worker women weren't due to go to work until 8:00 a.m. You can imagine the clamor when 40 people are getting up, walking through the halls, flushing toilets, getting their clothes on, banging doors, and the like. The same was true when the cold storage women were trying to sleep. When we are running long hours for several consecutive days (14-16 hours) the people are verging on exhaustion and they must get some sleep. This is imperative. We try to set up the housing so that we can best minimize the

disruption from various groups, especially large groups of people working different hours but working side by side. It is not a perfect system but it is the most fair and keeps disruption to a minimum.

22. Because of the problem with the cold storage women in 1980 we moved all of them into the two old bunkhouses on the south river end of the cannery.

\* \* \*

[pp. 2838-2839]

Q. So you, yourself, don't have hiring duties; is that correct?

A. Yes and no.

Q. The superintendent is the one who makes the final hiring decisions?

A. Yes, that's correct.

Q. Now, in your affidavit you mention that in 1962, you worked in Bristol Bay as a puller for an independent fisherman; is that correct?



A. Yes, sir.

Q. You graduated from high school in 1964; is that right?

A. Yes, sir.

Q. So how old were you when you started working as a puller?

A. Probably 16. 15 or 16.

Q. Then in 1965, Bumble Bee hired you as a tender deckhand, right?

A. I was rehired as tender deckhand.

Q. What was your first year as a tender deckhand?

A. 1964. I was working at New England Fish Company's Peterson Point Plant as a dishwasher and a waiter. When I left, when Peterson Point closed down their season, I contacted Bumble Bee to see if they had any openings.

Q. Okay. Well, how old were you when you started as a deckhand for Nefco? You would have been 18 years old?

A. I didn't start as a deckhand with Nefco. I started as deckhand with Bumble Bee.

Q. Sorry. You were 18 years old then?

A. Yes, sir.

Q. And Bumble Bee continued to rehire you in the deckhand position; is that right?

A. Yes, sir. Up until, I believe it was--yes, sir.

Q. Was this while you were in college, then?

A. Pardon?

Q. Was this while you were in college summers?

A. Yes.

\* \* \*

DISTRICT COURT

TESTIMONY OF JOHN R. GILBERT

[p. 2854]

1. My name is John R. Gilbert and I reside at 11025 Lakeside Avenue Northeast, Seattle, Washington. I hold the title of vice president of Bumble Bee Seafoods, Division of Castle & Cooke, Inc. . . .

\* \* \*

[p. 2861]

20. By and large our company fishermen boat pullers were selected by their captains. . . .

\* \* \*

[pp. 2882-2883]

Q. Okay, Mr. Gilbert. What I'm asking is whether in that exhibit you talk about the way in which women on the Local 37 crew are being hired?

A. More as to how they will be dispatched rather than how they will be hired.

Q. Is it correct to say that they are hired by the company directly, they are selected by the company directly?

A. Yes.

Q. After they are hired, they are dispatched, correct?

A. Yes.

Q. So is it fair to say that the use of the term "dispatched" in this exhibit means something other than selecting who is going to be a cannery worker?

A. I don't follow the question.

Q. What do you mean by the word "dispatched" in Exhibit 303?

A. Well, dispatched was the procedure. Now, the people were hired on the basis of their preference under the union agreement. And the dispatch

procedure was basically to--for the union representatives to have an opportunity to talk with them and explain their--how the union's jurisdiction and so on in relation to their employment.

Q. But in any case, they are hired before they are dispatched; is that right?

A. Yes.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF WINN F. BRINDLE

[p. 2887]

1. My name is Winn F. Brindle and I reside at 1251 22nd East, Seattle, Washington. I am 48 years of age and one of the sons of A. W. Brindle. Since the 1964 salmon season, I have been superintendent of the Columbia Wards Fisheries' cannery at Alitak on Kodiak Island.

\* \* \*

[p. 2890]

14. It is not our policy to hire by race but by ability and qualification. I can only recall one instance of a Filipino approaching me and asking for a higher paying job. That was Glen Ebat, a cannery worker in 1970 who asked to be a machinist helper the next year. We gave him that job because he appeared to have promise



and aptitude. He performed satisfactorily as a machinist helper in 1971 and I asked him to come back again in 1972. He refused, advising that there was too much peer pressure from his Filipino coworkers because he had taken the job and become an "Uncle Tom." He said he was going back to school rather than experience this pressure again.

15. We frequently use the AFU and the Machinists' Unions, Local 79, as sources of employees. We feel we have an obligation to contact these unions first and we also feel that there is a better chance to obtain qualified people at those sources, rather than hiring at random.

\* \* \*

[p. 2891]

20. Housing is generally organized by crew classification and time of arrival. The machinists,

carpenter/shipwrights, and beachgang are there a longer period of time, are higher paid, and as a matter of company policy receive better quarters. Also, since they arrive first the winter bunkhouse is opened first. The machinists also are at the cannery at the end of the season winterizing the machinery long after the cannery workers are gone. The housing is also organized by job department as the majority of a particular department will go to work at the same time which may be at a different time than another department. All housing has been slowly but surely upgraded through the years, since I have been there, and reported to our Affirmative Action director.

\* \* \*

[pp. 2891-2892]

21. When I first became superintendent at Alitak in 1964, we fed all employees in two shifts in one new

mess house. At the end of the season, I was advised by my father, A. W. Brindle, that Local 37 insisted that we reopen the other mess hall for Local 37 employees. Thereafter, it became our company policy to feed the male Local 37 employees separately. Their mess hall was known as the summer mess and the main mess as the winter mess. See Exhibit A-171, which are records kept in the ordinary course of business.

22. During the case period, the summer mess hall was used to feed the male cannery workers. These personnel are about 90% minority and 10% white. The other employees are fed at the winter mess and the racial composition of those employees will vary but occasionally is a majority of nonwhites. Throughout the case period, there always has been a substantial number of minorities in the winter mess hall. As seen by attached

Table C, the winter mess hall has had 55% minorities (1979) and 42% (1974).

23. Before salmon canning begins, at the end of the salmon season and during the crab season, all employees regardless of union affiliation are fed in the winter mess.

\* \* \*

[p. 2912]

Q. In some instances, do you hire people without what you consider to be either the best qualifications or even minimum qualifications?

A. You take calculated risks.

\* \* \*

[p. 2921]

Q. Isn't it true that within particular job classifications, there are different call-out times?

A. Yes, very definitely. And there's also cutoff times, too, which is just as important.

Q. Isn't it true, for example, that some cannery workers are called out before others?

A. Oh, yes.

\* \* \*

[p. 2927]

THE COURT: Well, I understood it to be on occasions, he hires students as carpenters, beach gang, et cetera, that they accommodate them and they come when they get out of school.

THE WITNESS: Yes, sir.

\* \* \*

DEPOSITION OF WINN F. BRINDLE

[p. 2]

Q. Would you please state your full name?

A. Winn Frederick Brindle.

\* \* \*

[p. 12]

Q. Did you assist in preparing the answer to Interrogatory 20-C?

A. Yes.

\* \* \*

[p. 14]

Q. When you wrote the minimums, the minimum experience requirements in this answer, were you copying them from another document that gave the minimum years of experience?

A. No. This is my personal preference of what I would like to have.

Q. So, it is your ideal for qualifications?

A. Yes.

Q. And Alitak may have hired on lower qualifications, in fact?

A. Oh, yes. We always shot for the best.

Q. So your answer to Interrogatory 20-C does not get job qualifications as they were actually imposed at Alitak from 1970 onward?

A. Right.

\* \* \*



DISTRICT COURT

TESTIMONY OF LARRY L. DeFRANCE

BY MR. ARDITI:

\* \* \*

[p. 2940]

Q. In this case, you have not done a construct validation study, have you?

A. No.

Q. Nor have you done a criterium-related validity study, have you?

A. No.

Q. In fact, you have not done a content validity study in full compliance with the Uniform Guidelines on Employee Selection Procedure, have you?

A. No.

\* \* \*

DIRECT EXAMINATION:

\* \* \*

[p. 2941]

1. My name is Larry L. DeFrance. I am a management consultant doing business as the Northwest Advisory Group, located at 19676 Southeast 150th Street, Renton, Washington 98056. My responsibilities include assisting clients in government, industry, and the legal profession in Washington, Oregon, and Alaska, in affirmative action programs and seminars, compensation administration, discrimination complaints and litigation, employee handbooks, job and performance evaluation systems, organizational planning, personnel policy and procedure manuals, personnel records systems, staff planning, and supervisory/management development.

\* \* \*

[p. 2944]

11. I have been retained as an expert by both the defense and plaintiffs

in several discrimination litigation cases.

\* \* \*

[pp. 2944-2945]

12. This affidavit was prepared in four sections.

a. Section I presents the method, results, and conclusions of the job analysis we conducted for this case.

b. Section II presents the results of a hypothetical prescreening of employees who worked for the defendants during the 1980 processing season. This prescreening used the qualifications opinion outlined in Section I, as well as the biographical sketches (or resumes) prepared for the defendants by Statistical Services Incorporated.

c. We researched the procedures used to code occupational data in the 1970 and 1980 Census of Population. Based upon this research, and the work

reported in Section I, I have outlined in Section III conclusions regarding the relevance of various Census occupational groups for purposes of the Labor Market Analysis of Dr. Rees. The purpose was to determine what census classifications would be more likely sources of employees with requisite skills, based upon the job analysis results, than members of the general population.

d. Finally, Section IV of this affidavit discusses the methodology and conclusions of plaintiffs' expert on job qualifications, Gary Latham.

e. Each of these areas is, or came to be through trial research within our realm of experience and expertise.

\* \* \*

[pp. 2945-2946]

13. In May of 1980, the Northwest Advisory Group accepted this assignment. Its purpose was to conduct a job analysis

of certain jobs in the salmon processing industry. This analysis was undertaken at the request of the law firm of Moriarty, Mikkelsen, Broz, Wells & Fryer. The jobs which were to be analyzed were in question as to minimum skills reasonably required, in a matter pending litigation.

14. The salmon canning industry has three distinct phases in its annual cycle:

a. The first, called the "preseason" occurs in the spring of each year, predominantly in the months of May and June. The timing and duration of the preseason will vary by year and location. During this phase, cannery facilities which had been abandoned to the Alaskan winter are made ready for the activity that occurs when the salmon runs begin. During the preseason, equipment which had been shipped to the lower 48 for overhaul

is reinstalled; the equipment winterized and left behind is repaired, tested, adjusted, and made ready for processing; the cannery itself and its associated systems (electrical, plumbing, hydraulic, etc.) are repaired and made ready, stores and supplies are laid in; facilities and docks are built and/or rebuilt; fishing boats and tenders prepared; and so on.

b. The second phase is the actual processing season itself. It begins with the annual return of the salmon to the spawning grounds. This occurs in late June or early July of each year and may last until August or September, depending upon several factors, including the geographical location of the cannery, the length of the salmon run in the area, the density of the salmon run, the catches allowed by local regulatory agencies, and so on. By now the canneries are fully staffed and the



work days are typified by long hours and the frenzied activity associated with the processing of a perishable food product.

c. The third phase of the operating cycle is the "offseason." The run for the year is completed, the cannery is winterized, the supplies, people, boats, and some of the equipment returned to the lower 48, where offseason overhaul and maintenance is performed on the boats and equipment.

15. The industry is, by its nature, one which involves great risk. Each year the canneries make huge capital and labor expenditures in advance of a fish run which simply may not appear. It is a seasonal business which deals with an unpredictable product yield and a highly perishable product. Processing occurs in remote geographical locations in which production operations are often hampered by logistical problems and climatological

conditions. It is an industry largely untouched by technological improvements. The industry has, as has all industry, been aided to some degree by the advancement of technology in general (improved electronic communications, computers, improvements in air and sea transportation, etc.). But the process of canning salmon and the technology involved in the canning process remains largely unchanged since the late 1930's.

16. The processing of salmon is either by canning or freezing. Freezing is the newer technology of the two.

17. The salmon are purchased from the fishing fleet and transported to the cannery by tender boats. There they are unloaded, sorted, and stored for a brief period of time before the canning process begins. The product begins to deteriorate when taken from the ocean and must be iced or kept in the hold of boats

equipped to refrigerate the fish with chilled sea water.

18. In the canning process, the salmon must be butchered, cleaned, cut to the proper size, placed into cans of the proper size and weight, vacuum sealed, and cooked in retorts (or large pressure cookers) for specified times under specified conditions to meet industry and government requirements. Once butchered, the product is highly perishable. The product must be fit for human consumption.

19. Time is of the essence in processing canned salmon.

\* \* \*

[pp. 2947-2950]

20. The first task was to perform a job analysis. The goal was to determine the minimum qualifications for certain jobs which were in issue. There are numerous reasons why practicing

professionals in the field of Human Resource/Personnel Management (those who are actively engaged in personnel management jobs) conduct job analyses, most having little or nothing to do with litigation.<sup>[1]</sup>

21. The point here is that it is a useful and customarily employed technique by practitioners. Psychologists and academicians generally place job analysis in a much more narrow context, both as to use and the appropriateness of different procedures.

22. Job analysis is a thorough and systematic study of jobs and what they

---

1. Any basic text on the subject of Personnel Management addresses the topic and its numerous uses. Contrary to the statement of Gary Latham in plaintiffs Exhibit 641 (p. 1), Ash and Levine, for example, have identified 10 potential uses or purposes for job analysis (pp. 54-55). McCormick, writing in the American Society of Personnel Administrators' "Handbook of Personnel and Industrial Relations" (pp. 4-40), identifies some 22 purposes.

involve and/or require.<sup>[2]</sup> [Footnote omitted.] It is a process that focuses on the here-and-now, the way things are as opposed to the way things should be, and considers the total relevant context in which the work is performed. This is what we attempted to do.

\* \* \*

23. There are numerous techniques for analyzing jobs. They may be used separately, or in combination.<sup>[3]</sup> [Footnote omitted.]

24. It was against this background that we undertook our assignment to conduct an analysis of the jobs in the present case with an eye towards developing minimum reasonable job requirements. We employed the most traditional techniques, namely, the interviewing of incumbent job holders and their supervisors, supplemented by

observation of incumbents and supervisors in the work environment.

\* \* \*

25. Our assignment involved analyzing jobs in five Alaskan canneries. The canneries were owned by three different business entities: Wards Cove Packing Company, Inc. (WCP), Bumble Bee Seafoods (BBSF) (a division of Castle & Cooke, Inc.), and Columbia Wards Fisheries (CWF).

26. Three of the canneries are in the Bristol Bay vicinity, one is on Kodiak Island, and one is near Ketchikan.

27. The western most cannery is the CWF facility at Ekuk. It is situated at approximately longitude 158.5° on Nushagak Bay. This cannery, which is a completely self-contained camp, is some 20 miles by air charter or boat from the nearest town (Dillingham) serviced by commercial airlines. The airport in



Dillingham has a gravel runway and the resident population numbers perhaps 1,000 people. There is a medical facility available in Dillingham. Ekuk is a self-contained camp.

28. The next two canneries are approximately at longitude 157° on Kvichak Bay at the mouth of the Naknek River. The CWF cannery at Red Salmon is approximately four miles east of the town of Naknek on the north side the river. The BBSF cannery is across the river at South Naknek. Red Salmon and BBSF, like Ekuk, are camp environments. Both are approximately 15 miles from the nearest commercial air service at King Salmon. Red Salmon lies off a paved road which runs between King Salmon and Naknek. BBSF is accessible only by boat or charter plane. The medical facilities available are at King Salmon. The population of

Naknek and King Salmon are not known to us, but neither is very large.

29. The next facility is CWF Alitak which is located at the opposite end of Kodiak Island from the town of Kodiak. It is located near Cape Alitak on Alitak Bay at approximately longitude 154°. The three previous canneries are on the Bering Sea side of the Aleutian Islands, while Alitak is on the Pacific Ocean side. Alitak is accessible only by boat or float plane and is approximately 100 miles from the nearest commercial air field at Kodiak. The population of Kodiak is approximately 30,000 people and it is the nearest medical facility. Alitak is a completely self-contained camp, and very isolated.

30. The last cannery is the WCP facility on Wards Cove at approximately longitude 132°. It is some nine miles north of Ketchikan, the nearest

commercial airport, by paved road. It is not nearly as self-contained as the other four facilities, and draws heavily on the labor market and services in Ketchikan, Alaska's third largest city.

31. Ekuk, BBSF, and Alitak have no telephones and must communicate with civilization by radio. Red Salmon and Wards Cove now have telephone communications.

32. Commercial air transportation to Dillingham and King Salmon is available only through Anchorage. The logistics associated with moving people, equipment, and supplies to all locations except Wards Cove are difficult, at best, and very unreliable. This is particularly true for Alitak, which is subjected to sudden and severe changes in weather, even in the summertime.

33. All five canneries have different layouts of the physical plant,

and notable differences in the age and condition of the processing equipment. For example, the boilers which provide the steam at Ekuk are manual, while the other canneries have automatic boilers. Likewise, the processing equipment at Alitak has, over the period of the last several years, been shipped to the lower 48 and overhauled during the offseason. Much of the plant at Red Salmon is newer, having been rebuilt after a major fire in 1973.

34. In addition, there traditionally have been differences in the length of the salmon run at the different locations, and in the various species of salmon involved in the different runs. For example, the processing season at Ekuk, typically starts in mid-June and is completed by the end of the first week in August. The processing season in Ketchikan, on the

other hand, typically does not start until early July and will extend until early September. The 1980 processing season at Red Salmon and BBSF lasted only two weeks. The Bristol Bay canneries process a greater variety of salmon species, the majority being Reds and Chums. Bristol Bay also has a more intensive salmon run. Alitak and Wards Cove tend to process more Pinks. The species is a factor in the adjustment of the iron chink and the filler.

35. These and many other differences between the canneries are important to note. The operating environments, and the differences in them, must be considered for the analysis of jobs within those environments.

\* \* \*

[pp. 2950-2953]

36. It was our strategy while performing this analysis to immerse

ourselves totally in the project. We spent 27 man days in the canneries in Alaska. Seventy man days were spent in research and the development of back-up information prior to the trips. Several hundred pages of material were reviewed, including such things as shop manuals on the processing equipment, history of the salmon canning industry in Alaska, and so on. (See Exhibit B). I also visited the Bumble Bee Seafoods cannery in Bellingham, Washington.

37. Two trips were made to the canneries by each of our personnel assigned to the project. The project was under my supervision, and Mr. James A. Vawter assisted me in the design of the structured questionnaire we used, as well as with the interviewing and observation. Mr. Vawter is an experienced consultant and interviewer who assists with job



analysis as a normal part of his work with us.

38. In mid-June, during the preseason, each consultant visited all canneries with the exception of Alitak which was inaccessible due to local weather conditions. Approximately 30 days later, during the processing season, Mr. Vawter again visited Ekuk, Red Salmon, and BBSF. At the same time, I went to Alitak and Ketchikan.

39. Each trip was made to interview various job incumbents, using a structured questionnaire approach. Incumbents were also observed in the performance of their duties. As an additional record, cannery operations were photographed both during preseason and processing season. Approximately 1,500 photos were taken.

40. The Job Information Checklist which was used appears in Exhibit C-1.

The interviews took approximately 45 minutes to an hour and 15 minutes each, and all incumbents reviewed the Checklist at the end of the interview, made changes and corrections as necessary, and signed the Checklist to verify the accuracy of the information recorded. This is a standard technique in job analysis.

41. All interviews were conducted in private, unless an interpreter was required, and all incumbents were told that the interviews and their Checklist were strictly confidential and the Checklists would be seen by no one except for members of the consulting firm. Privacy and confidentiality are essential to obtain accurate information. Such assurances are standard when conducting a job analysis.

42. As letters had been distributed to class members explaining the interviews in the context of the pending

litigation, we explained to those interviewed, class and nonclass members alike, that:

a. There was a lawsuit involving race discrimination.

b. Our assignment was to study jobs to provide an independent opinion as to minimum skills.

c. This involved interviewing several people like themselves in similar jobs in several locations.

d. Our report to the court would be a summary of these many interviews.

e. We would also be in the cannery to observe work processes and may ask more questions later.

This was done to minimize the potential impact of rumor on our results.

43. It became apparent after the first few preseason interviews that the Job Information Checklist for recording

incumbent interviews was far too lengthy and contained redundant information. A decision was made to modify the Checklist, deleting the questions noted in Exhibit C-2.

44. In addition, each incumbent was presented with nine paragraphs taken verbatim from the instruction booklet for filing the annual Employer Information Report (EEO-1) with the federal Joint Reporting Committee. The incumbents were asked to select the paragraph that in their judgment best described their jobs. The paragraphs used appear in Exhibit D.

45. Also, the incumbents were presented with selected job descriptions from the Dictionary of Occupational Titles (D.O.T.). They were asked to select which, if any, described their job. A total of some 63 job descriptions were available, although the analysts preselected those presented to the

incumbents since all job descriptions did not apply to all positions. Exhibit E-1 shows which D.O.T. job descriptions were presented to the incumbents for their selection and Exhibit E-2 contains copies of the actual D.O.T. descriptions used.

46. In addition, during the second trip to Alaska for the processing season, supervisory personnel were interviewed regarding the positions which reported to them. This is commonly done in job analysis as a cross-check against what incumbents say. The supervisors were interviewed using a structured Job Information Checklist, which appears as Exhibit F. These interviews were brief, typically taking about twenty minutes each. At the conclusion of each interview, the supervisor was asked to review the Checklist, make any changes necessary to ensure the accuracy of the reported information, and sign to

indicate its accuracy. The supervisors also selected EEO-1 paragraphs and D.O.T. job descriptions.

47. A total of 69 incumbents were interviewed. Forty-four of the incumbents were interviewed during the preseason. The balance were interviewed during the processing season. During the processing season some 42 interviews were held with supervisory personnel regarding the jobs in question.

48. We also observed cannery operations, as well as incumbents and supervisors in the performance of their duties (including tenders). Various meetings were held with cannery superintendents and foremen. Cannery layouts and workflow were analyzed. We met with the on-site medical personnel to discuss the hazards involved in cannery work.



49. Additional interviews were conducted with eight incumbents of office positions plus two of their supervisors. These were held after the season in December of 1980 and did not include the office personnel from BBSF. These interviews were required to clarify conflicting information which resulted from differences in job titles used by incumbents in the Alaska interviews.

50. Incumbent responses on the Job Information Checklist were summarized and cross-checked against the ten items appearing on the Job Information Checklist for supervisors. All Checklists were grouped according to job title, and summaries prepared of Checklist responses for supervisors and incumbents.

51. Similarly, the EEO-1 paragraphs and the D.O.T. job descriptions selected by incumbents and supervisors were

tabulated to allow comparison between supervisors and incumbents responses by job title.

52. Each consultant independently reached his conclusions, and these results and conclusions were jointly prepared.

\* \* \*

[p. 2954]

Several of the incumbents interviewed during the pre-season and processing season were in supervisory or management positions. Such positions are clearly skilled and required extensive experience to perform. As a result, the following job titles were excluded from further, more detailed, analysis:

1. Cannery foreman;
2. Assistant manager;
3. First machinist;
4. Office manager;
5. Carpenter foreman;

6. Beach boss;
7. Net boss;
8. Set net pick up boss;
9. Tender captain.

In addition, the following job titles clearly require substantial prior skills and experience, and we understand have been so conceded by counsel for the plaintiff:

1. Port engineer;
2. Wet tender engineer;
3. Carpenter; carpenter/  
shipwright;
4. Shop machinist;
5. Refrigeration man;
6. Electrician.

Again, the Checklists of individuals in these job titles were excluded from further, more detailed, analysis.

\* \* \*

[pp. 2970-2974]

53. Since the purpose of the study was to determine minimum skills reasonably required, we have tended to be conservative in our conclusions. In assessing reasonableness of skill, we used as a standard that degree of skill expected to be possessed by most people generally engaged in a particular trade, occupation, or job.

54. Our conclusions are presented with the following caution. We analyzed the jobs in question during only two of the three phases in the cannery operating cycle. We did not seek, nor did the Checklists provide, much information about the duties of the incumbents, nor the skills required of them, during the offseason. Many of the employees interviewed, however, indicated that they were employed on a year-round basis by the canneries.

55. In reaching our conclusions, we considered not only the information available from the Checklists, but also the myriad of other data available to us based upon our personal observation, research, and experience (see also Exhibit B).

56. Finally, our conclusions regarding minimum skills are stated for each position taken by itself. We do not mean to imply that it would be practical, realistic, or reasonable in terms of running a safe, efficient, and/or profitable operation, to staff each position with people meeting only minimum requirements. It is our judgment that any business staffing at a minimum skills level for all positions is asking for trouble. We believe this is even more true for those operating in the kinds of conditions (remoteness, short and intense production periods, perishable product,

difficult logistics, etc.) in which the canneries must operate. These factors, and the financial risk associated with this business, would lead any prudent person to this conclusion.

57. The following jobs are supervisory, require management abilities, and extensive experience to successfully perform: superintendent, cannery (machinist) foreman, assistant manager, first machinist, office manager, carpenter foreman, beach boss, net boss, setnet pick-up boss, and tender captain.

58. The following jobs require substantial prior skill and experience to successfully perform: port engineer, wet tender (briner) engineer, carpenter, carpenter-shipwright, shop machinist, refrigeration man, and probably electrician.

59. Minimum qualifications reasonably required for successful



performance of the jobs listed below are as follows:

a. Iron Chink Machinist.

Requires two seasons experience as a helper-trainee in the fish house with one winter of off-season training or one year of mechanical experience of a similar nature. This job also requires an ability to work with minimum supervision and without the aid of shop manuals, a knowledge of and ability to use mechanic's hand tools for adjustment and repair of equipment, early season availability, and ability to understand and communicate effectively in English. Must be capable of training a machinist helper-trainee in the fish house if one is employed.

b. Reformer-Can Shop Machinist. Requires two seasons as machinist helper-trainee in cannery

or six months mechanical experience of a similar nature. Job requires the ability to work without close supervision, knowledge of and ability to use seam micrometers, gauges, and mechanic's hand tools to make adjustments and repairs to equipment. Must be able to read, comprehend, and communicate effectively in English, understand mechanical drawings, and possess leadership skills. Early season availability is also required.

c. Fillerman. Requires two seasons as machinist helper-trainee on the canning line with one winter of off-season training, or one year of mechanical experience of a similar nature. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Ability to read, comprehend, and communicate

effectively in English, ability to understand mechanical drawings and early season availability are required. Leadership skills may also be required.

d. Filler Operator. See machinist helper-trainee.

e. Seamerman. Requires two seasons experience as a machinist helper-trainee in the cannery or six months mechanical experience of a similar nature. Ability to read, comprehend, and communicate effectively in English is required. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Early season availability is also required.

f. Seamer Operator. See machinist helper-trainee.

g. Salmon Cook-Pipefitter.

Requires one year of plumbing and/or pipefitting experience, less depending on amount and type of experience with boilers or pressure vessels. Job requires proficiency in basic mathematics, ability to read gauges and thermometers, and ability to handle the strain, responsibility, and pressure of "cooking" as many as nine retort loads of salmon simultaneously. Must have knowledge of and ability to use mechanic's and pipefitter's tools to make adjustments and repairs. Must be able to understand and accurately complete required inspection and report forms required by governmental agencies and industry associations. Early season availability is also required.

h. Machinist Helper-Trainee.

Requires mechanical ability, knowledge of and ability to use mechanic's tools. Must be flexible, willing to learn, and to follow directions. Must be able to communicate effectively in English and have the ability to read and comprehend English if placed in canning line or can shop. Early season availability is required.

i. Fireman. Requires

mechanical ability, ability to use mechanic's and some pipefitting tools, and early season availability.

For the foregoing machinist crew jobs: possession of at least one of the following additional skills is highly desirable and preferred in hiring: welding, pipefitting, electrician, and machine shop; requires willingness and ability to work independently or with

other crew members in performing a wide variety of maintenance and repair tasks on cannery buildings, grounds, fixtures, and equipment.

j. Quality Control. Requires ability to read, comprehend, and communicate effectively in English, ability to check weights, record temperatures, and use basic mathematics through decimals. Must have ability to handle detail, be able to handle reports and paperwork, be reliable, and be honest. One season of general cannery experience or other relevant experience or education, such as food technology, is required.

k. Beachman. Requires good health, and the capacity for and ability to perform heavy work out-of-doors. Requires familiarity with wide range of hand tools (both



mechanical and carpentry), small power tools, and operation of forklifts and other equipment. Minimum qualification requirements vary depending on size of beachgang: the larger the beachgang, the greater the ability to take on less skilled personnel. Minimum qualifications for a new beachman joining a crew of three or more beachmen (not including beach boss) would be three to six months prior heavy work experience, preferably out-of-doors and construction or shipyard related.

1. Dry Tender Engineer.

Requires one year of related boat experience or six months engine mechanical experience and one season of tender experience, knowledge of and ability to use mechanic's and some pipefitting tools to make adjustments and repairs to shipboard

machinery and equipment, ability to live in small quarters and function as an effective member of a small group. Willingness and ability to work long hours on ocean-going vessel is required. Ability to act as relief helmsman and back-up navigator may be required on some boats.

m. Accountant/Bookkeeper.

Requires two years formal bookkeeping education or comparable work experience, familiarity with use of computers in data processing (depending upon location), typing, and ability to accurately operate ten-key calculator. Two seasons as assistant cannery bookkeeper would also satisfy requirements. English literacy and preseason availability are required.

n. Assistant Bookkeeper.

Requires knowledge of basic

bookkeeping, basic mathematics, familiarity with use of computers in data processing (depending upon location). Job also requires ability to use typewriter and accurately operate ten-key calculator. English literacy is required. Preseason availability is required.

o. Office Assistant/

Bookkeeper-Helper. Requires knowledge such as would be obtained from office practice training course or comparable work experience, knowledge of basic mathematics, ability to type, and ability to accurately use ten-key calculator. Preseason availability may be required. English literacy required.

60. Qualifications required for any individual position depend to a certain extent on the cannery involved, the age and condition of equipment, skill level of other incumbents and supervisors, and

other such factors. Offseason work may require additional and/or different skills, or no skills.

\* \* \*

[pp. 2974-2975]

61. As our work on the job analysis was concluding we were asked by counsel to research the coding of occupational data in the decennial Census of Population. The purpose was to establish whether or not groups of Census job codes could be established which would be more likely sources of people with the requisite skill, experience and/or training for cannery jobs than those found in general population statistics. If this could be accomplished the experts who were working on the question of availability would be better able to specify the racial characteristics of the external labor market for the position in question.

62. This was done after an extensive review of the way the Bureau of Census handles the coding of occupational data.

[pp. 2981-2986]

63. Our primary sources for developing the Census categories we selected were the same. Both the Alpha and Classified Indices include the categories used in the Industrial Classification System and in the Occupational Classification System. It was the latter which was of particular use to us. It correlates the 23,000 job titles used by the Census into some 417 categories.

64. Each of the 417 categories was examined in depth, referring to the occupational section of the Classified Index when needed, to determine if the job titles listed in a category were such that it was likely to contain people with

backgrounds consistent with our skills requirements. The D.O.T. was used as needed to clarify job titles which were unfamiliar to us.

65. In the case of the defendants' jobs which were not studied by us, we examined the categories assuming some experience was needed. The specific experience was based upon information provided by the defendants. The assumptions were:

1. Storekeeper - retail or mercantile experience;
2. Stockman - stocking experience;
3. Steward and First Cook - institutional or camp cooking experience;
4. Other Cooks - occupational cooking experience;
5. Baker - occupational baking experience;
6. Pilebucks and Pilebuck Boss - experience in piledriving, working with cranes, or building docks;
7. Nurse - experience as an RN;
8. Painter - experience in structural painting;
9. Set Net Pickup - truck driving experience;



10. Mate/Deckhand and Deckhand  
-occupational experience  
with boats;
11. Radioman - radio repair  
experience and license;
12. Brite Stack Machinist -  
Same as Machinist Crew  
plus electronics  
experience; and
13. Casing Machinist - same as  
Machinist Crew plus  
electrical experience.

The results of our study are presented in  
below.

#### ACCOUNTANT/BOOKEEPER

- 001 Accountants
- 141 Adult Education Teachers
- 202 Bank Officers & Financial  
Managers
- 304 Bookkeeper
- 312 Clerical Supervisors, N.E.C.

#### ASSISTANT BOOKEEPER

- 141 Adult Education Teachers
- 303 Billing Clerks
- 304 Bookkeepers
- 312 Clerical Supervisors, N.E.C.
- 341 Bookkeeping & Billing Machine  
Operators
- 342 Calculating Machine Operators
- 360 Payroll Clerks

#### OFFICE ASSISTANTS/BOOKEEPER HELPER

- 303 Billing Clerks
- 325 File Clerks
- 341 Bookkeeping & Billing Machine  
Operators
- 342 Calculating Machine Operators
- 360 Payroll Clerks
- 372 Secretaries, N.E.C.
- 391 Typists
- 395 Not specified Clerical Workers

#### TENDER CAPTAINS

- 221 Officers, Pilots & Pursers;  
Ship
- 701 Boatmen & Canalmen
- 725 Fishermen & Oystermen

#### DRY TENDER ENGINEER

- 473 Automobile Mechanics
- 481 Heavy Equipment Mechanics, Inc.  
Diesel
- 523 Plumber & Pipe Fitter  
Apprentices
- 545 Stationary Engineers
- 661 Sailors & Deckhands
- 701 Boatmen & Canalmen
- 747 Auto Mechanics, Apprentices
- 752 Fishermen & Oystermen

#### WET TENDER ENGINEER

- 473 Automobile Mechanics
- 481 Heavy Equipment Mechanics, Inc.  
Diesel
- 523 Plumber & Pipe Fitter  
Apprentices
- 545 Stationary Engineers
- 661 Sailors & Deckhands
- 701 Boatmen & Canalmen
- 747 Auto Mechanics, Apprentices
- 752 Fishermen & Oystermen
- 470 Air conditioning, Heating, &  
Refrigeration Mechanics

#### PORT ENGINEER

- 134 Trade, Industrial, & Technical  
Teachers
- 461 Machinists
- 481 Heavy Equipment Mechanics,  
Inc., Diesel
- 540 Shipfitters
- 545 Stationary Engineers
- 561 Tool & Die Makers

REFRIGERATION MAN

134 Trade, Industrial, & Technical Teachers  
 470 Air conditioning, Heating, & Refrigeration Mechanics  
 545 Stationary Engineers

ELECTRICIAN

134 Trade, Industrial & Technical Teachers  
 430 Electricians

CARPENTER, SHIPWRIGHT

134 Trade, Industrial & Technical Teachers  
 415 Carpenters  
 416 Carpenter Apprentices

SHOP MACHINIST

134 Trade, Industrial & Technical Teachers  
 461 Machinist  
 462 Machinist Apprentices  
 561 Tool & Die Makers  
 562 Tool & Die Makers' Apprentices  
 652 Lathe & Milling Machine Operatives

BEACH GANG

412 Bulldozer Operators  
 416 Carpenter Apprentices  
 424 Cranemen, Derrickmen, Hoistmen  
 433 Electric Power Linemen & Cablemen  
 436 Excavating [sic], Grading & Road Machine Operators; excluding Bulldozer  
 550 Structural Metal Craftsmen  
 554 Telephone Linemen & Splicers  
 661 Sailors & Deckhands  
 680 Welders & Flame-Cutters  
 706 Forklift and Tow Motor Operatives

710 Motormen; Mine, Factory, Logging Camp, etc.  
 750 Carpenter's Helpers  
 760 Longshoremen & Stevedores  
 761 Lumbermen, Raftsmen & Woodchoppers  
 822 Farm laborers, Wage Workers  
 823 Farm Laborers, Unpaid Family Workers

QUALITY CONTROL

323 Expeditors & Production Controllers  
 393 Weighers

HELPER/TRAINEE

401 Automobile Accessories Installers  
 431 Electrician Apprentices  
 462 Machinist Apprentices  
 479 Automobiles Mechanic, Apprentices  
 480 Farm Implement Mechanics  
 482 Household Appliance & Accessory Installers & Mechanics  
 486 Railroad & Car Shop Mechanics  
 491 Mechanic, excluding Auto, Apprentices  
 492 Miscellaneous Mechanics & Repairmen  
 523 Plumber & Pipe Fitter Apprentices  
 562 Tool & Die Maker Apprentices  
 604 Bottling & Canning Operatives  
 621 Filers, Polishers, Sanders & Buffers  
 633 Meat Cutters & Butchers, Mftg.  
 642 Oilers & Greasers, excluding Auto  
 650 Drill Press Operatives  
 651 Grinding Machine Operatives  
 656 Punch & Stamping Press Operatives  
 680 Welders & Flame-cutters

690 Machine Operative, misc.  
specified

SALMON COOK/PIPE FITTER

134 Trade, Industrial & Technical  
Teachers  
404 Boilermakers  
470 Air-conditioning, Heating &  
Refrigeration Mechanics  
522 Plumbers & Pipe Fitters  
523 Plumbers & Pipe Fitters  
Apprentices  
545 Stationary Engineer  
622 Furnacemen, Smeltermen &  
Pourers  
666 Stationary Firemen  
680 Welders & Flame-cutters

MACHINIST CREW (Fillerman, iron  
chink, seaman & can shop man)

134 Trade, Industrial & Technical  
Teachers  
141 Adult Education Teachers  
461 Machinists  
462 Machinist Apprentices  
471 Aircraft Mechanics  
473 Automobile Mechanic  
474 Automobile Mechanic Apprentice  
480 Farm Implement Mechanics  
483 Loom Fixers  
486 Railroad & Car Shop Mechanics  
491 Mechanic, excluding Auto,  
Apprentices  
495 Not specified Mechanics &  
Repairmen  
502 Millwrights  
523 Plumbing & Pipe Fitting  
Apprentices  
562 Tool & Die Maker Apprentices

FIREMEN

523 Plumbers & PF Apprentices  
622 Furnacemen, Smeltermen &  
Pourers

626 Metal Heaters  
666 Stationary Firemen

SALMON COOK

134 Trade, Industrial & Technical  
Teachers  
622 Furnacemen, Smeltermen &  
Pourers  
626 Metal Heaters  
680 Welders

BEACH BOSS

412 Bulldozer Operator  
424 Cranemen, Etc.  
436 Excavating, Grading, Etc.  
Operators  
706 Forklift & Tow Motor Operators  
710 Motormen, Mine, Factory, Etc.  
760 Longshoremen  
441 Foreman, N.E.C.

FIRST MACHINIST

441 Foremen, N.E.C.  
461 Machinist  
502 Millwrights  
561 Tool and Die Makers

CANNERY FOREMAN

245 Managers & Administrators,  
N.E.C.  
441 Foreman, N.E.C.  
461 Machinist  
502 Millwrights  
561 Tool and Die Makers

NETMAN/NETBOSS

762 Fishermen & Oystermen

CARPENTER FOREMAN

415 Carpenters

OFFICE MANAGER

001 Accountants  
202 Bank Officers



305 Bookkeepers  
312 Clerical Supervisors, N.E.C.  
220 Office Manager, N.E.C.

STOREKEEPER

245 Managers & Administrators,  
N.E.C.  
282 Sales Representatives,  
Wholesale Trade  
283 Sales Clerks, Retail Trade  
225 Buyers

STOCKMAN

283 Sales Clerks, Retail Trade  
381 Stock Clerks, Storekeepers

STEWART & FIRST COOK

230 Restaurant, Cafe [sic] & Bar  
Managers  
912 Cooks, Excluding Private  
Household  
950 Housekeeper, Excluding Prive  
[sic] Household  
981 Cooks, Private Household

OTHER COOKS

230 Restaurant, Cafe & Bar Managers  
912 Cooks, Excluding Private  
Household  
950 Housekeeper, Excluding Prive  
[sic] Household

BAKER

402 Bakers

PILEBUCKS

415 Carpenters  
416 Carpetners [sic] Apprentices  
424 Cranemen, etc.  
436 Excavating, Etc., Operators

PILEBUCK BOSS

415 Carpenters  
424 Cranemen, etc.

436 Excavating, Etc., Operators  
441 Foreman, N.E.C.

NURSE

075 Registered Nurses

PAINTER

510 Painters, Construction &  
Maintenance  
511 Painter Apprentice

SET NET PICK-UP

715 Truck Drivers

MATE/DH, D/H

661 Sailors, D/H's  
701 Boatmen & Canalmen  
752 Fishermen & Oystermen  
221 Officers, Pilots, Pursers -Ship

RADIOMAN

153 Electrical & Electronic Techs  
171 Radio Operators  
485 Radio & TV Craftsmen

BRITE STACK MACHINIST

153 Electronic Techs  
485 Radio & TV Craftsmen  
430 Electrician  
431 Electrician Apprentice

CASING MACHINIST

134 Trade, Industrial & Technical  
Teachers  
430 Electricians  
141 Adult Education Teachers  
461 Machinists  
462 Machinist Apprentices  
471 Aircraft Mechanics  
473 Automobile Mechanics  
474 Automobile Mechanics  
Apprentices  
480 Farm Implement Mechanics  
481 Heavy Equipment Mechanics, Inc.  
Diesel

483	Loom Fixers
486	Railroad & Car Shop Mechanics
491	Mechanic, excluding Auto, Apprentices
495	Not specified Mechanics & Repairmen
502	Millwrights
523	Plumbing & Pipe Fitting Apprentices
562	Tool & Die Makers' Apprentices

\* \* \*

[pp. 2987-2990]

66. Our task here was to compare the backgrounds as shown on the employee questionnaires assembled by Statistical Services, Inc. (SSI, Mr. Parker and Ms. Dittner) to see if, hypothetically, certain employees of defendants would have survived a prescreen process on their initial hire or if they possessed certain qualifications which would have allowed them to be prescreened into other jobs. This is one of the common duties of Human Resources/Personnel Managers with employment related responsibilities. It is done because the recruiting effort (i.e., the process of getting applicants

in the first place), if successful, typically can yield large numbers of applicants for a single position.

67. Thus, the employment process, at least to the point of identifying the final candidates for a position, is largely one of narrowing down the number of people who have applied. This process, which may have several steps, is usually called "pre-screening" the applicants.

68. If the recruiting activity has involved advertising duties and qualifications and soliciting resumes, the initial prescreening is done on the basis of information on the resumes received. It may also be done on the basis of information from company employment applications and/or brief interviews with applicants. It simply involves a knowledgeable person comparing job requirements with reported training and experience and making a judgment that

each individual meets or does not meet the job requirements, or that more information is needed to make that determination.

69. Those individuals judged to meet requirements then proceed to the next stop of the process which is usually, but not always, an employment interview. Those individuals falling in to the "need more information" category may, or may not, be contacted for that information, depending upon how many people appearing to meet qualifications are available. The process is considered in most of the texts available on the subject of personnel management or employment, several of which appear in our bibliography. It is a standard technique commonly used by personal practitioners.

70. Biographical backgrounds, or brief resumes, were available on most of the people employed by the defendants in

1980. These were prepared by Statistical Services, Inc., using the procedures outlined in Roger Parker's affidavit. Modified versions of these resumes were used to perform a prescreening of the incumbents based upon the job skills requirements identified in our job analysis. They were modified in the sense that information identifying the incumbents was removed from each resume.

71. I performed several hypothetical prescreenings using the modified SSI resumes.

72. First, those of the noncannery workers were evaluated to determine if each individual would have survived a prescreen at the point of first job hired by one of the defendants, if the job was one we had studied.

73. Second, the noncannery worker resumes were examined to determine if each individual would survive a prescreen



at the point the person was first hired into a position we studied, whether or not it was the first job that the individual held with a defendant.

74. Third, resumes of cannery workers were examined to determine if, at the point of first hire by a defendant, they met the qualifications for any of the jobs we studied.

75. In all cases, "point of first hire" was construed to mean after 1970.

76. The results of this prescreening analysis are presented as follows:

a. Based on a study of the information provided in the 1980 noncannery worker profiles at the point of first job hired by one of the five class facilities after 1970 (if the job was one studied):

(1) "Qualified" for position: 131/139. . . .

(2) "Not Qualified" for position hired: 8/139. . . .

(3) "Need More Information:" 14/262. . . .

(4) Position for which person was hired was not one studied by expert: 109/262. . . .

b. Based on a study of the background profiles of the 1980 noncannery workers at point the person was first hired by one of the five class facilities after 1970 into a job studied by expert (whether or not it was the first job person held with a defendant):

(1) "Qualified" for position hired: 155/164. . . .

(2) "Not Qualified" for position hired: 9/164. . . .

(3) "Need More Information:" 29/262. . . .

(4) Did not hold job studied by expert: 69/262. . . .

c. Based on a study of the background profiles of the 1980 cannery workers in the survey at the point of first hire after 1970 by one of the five class facilities, the employees can be categorized as follows:

(1) The employees identified by number in Exhibit I.1 would pass the first step of a prescreening process for the non-cannery worker jobs lists opposite the employees identification number.

(2) The employees identified by number Exhibit I.2 would not pass the first step of a prescreening process for a non-cannery worker job studied.

(3) Additional information is needed to determine whether the following persons identified by employee number in Exhibit I.3 would pass the first step of a pre-screening

process for a non-cannery worker job studied.

77. It should be pointed out that such prescreening was routinely part of my, or my staff's responsibilities while at Unigard. It has also been a standard part of the curriculum of courses I have taught on the subject of employee selection or personnel [sic] management, including the accreditation course I am currently instructing for the American Society of Personnel Administrators. In fact, the text for that course is a good reference for the subject.<sup>[8]</sup>

\* \* \*

[pp. 2996-3001]

120. One of the most difficult tasks of the researcher is that of keeping his/her work in the context of the real,

8. See "ASPA Handbook of Personnel and Industrial Relations," Staffing Policies and Strategies, Chapter 4.4, "Selection, Interviews, and Testing," by Harold Stone and Floyd Ruch.

as opposed to the ideal. This is difficult, in part, because the researcher is trained to work in the abstract and to seek perfection in the research method.

121. We have already seen that job analysis must consider the context in which the jobs occur. The result of a job analysis is a snapshot or picture of the jobs and their requirements as they exist in a particular setting, at a particular time.

122. Unfortunately, litigation is not a normal context for most job analyses. It is important that the job analyst remember that while litigation raises many issues worthy of examination, the expert's position is not one of advocacy.

123. The matter is further complicated by the fact that experts work in the fields that are technical in

nature. This makes it difficult to communicate one's approach and results to the various lay people involved, particular when dealing with the rebuttal of the other sides expert.

124. It is our belief, then, that one of the primary functions of the expert is to simplify and clarify for the court matters that can be highly technical. This cannot be accomplished without grounding the expert opinion solidly in reality.

125. It has been our purpose, in the present litigation, to focus on the intelligibility of our work and conclusions, while staying within the boundaries of generally accepted professional ground rules.

126. The context for the jobs and skills requirements for the present litigation is unique. What are its attributes?



127. First, the defendant is engaged in a high risk, profit-oriented, competitive business. The business is seasonal and the product highly perishable, and must be fit for human consumption.

128. Second, production operations are carried out in remote and often isolated locations. Logistics and communications with the "outside world" are difficult, to say the least. The canneries, by and large, must be self-sufficient camps.

129. The production operations involve a tremendous "front end" capital expenditure. Equipment and supplies must be taken North well ahead of the production cycle. Likewise, labor is secured in advance of production and wages guaranteed for the season for large numbers of employees.

130. While there are similarities in the canneries, there are differences as well. Many of these differences are trivial, but many are not.

131. In the present case, there are three different ownerships of the facilities. There are differences in the age and condition of the physical plant and equipment. There are differences in the services the canneries provide to the fishing fleet. There are differences in the availability of parts and outside services. There are differences in the type of duration of the fish run from location-to-location and from year-to-year in the same location.

132. Significantly, there are differences year in and out in the available supply of labor. In a period of low unemployment skilled employees are more difficult to find and employees more likely to have to settle for people that

will have to "make do" with. If one is fortunate, making do may work for a time. But that does not mean it is desirable or prudent, particularly in a business with an inherent high risk factor such as processing canned salmon in Alaska.

133. Plaintiffs have basically argued that the positions in question can be learned during the preseason by people of little experience and average mechanical ability, if the responsibilities are restructured to eliminate the requirement that incumbents be able to troubleshoot, repair, and maintain the equipment. We have already pointed out that this begs the question. The jobs are structured the way they are for reasons, including many of the factors outlined above. That they may be structured an infinite number of different ways may be arguable, but is not relevant in job skills analysis.

134. Supervisory personnel are in the canneries to supervise, not to perform the work of their subordinates. The fact that they may be able to do this, if needed, is interesting, and would perhaps make a Superintendent more comfortable, but it is not relevant to the issue of what the subordinates are hired and paid to do.

135. Crews are taken North in the preseason to make the cannery ready for production, not to train a collection of inexperienced people. Since they are working on the equipment some training is possible, in some canneries and in some situations.

136. Observing a cannery in operation, something which Plaintiffs' expert has not done in several years and never done in any of the Defendants' facilities, is an enlightening process.

137. If everything goes as it "should," the cannery operates smoothly and there are no equipment breakdowns or failures. Indeed, there is a certain amount of gambling among incumbents regarding who will have the fewest breakdowns and equipment down time. The machinists on the line and the Tender Engineers can appear to the casual observer to be machine operators.

138. However, things go as they "should" only if there has been proper maintenance and set-up of the equipment. It also requires a little luck, since equipment will break down under even the best of conditions.

139. Why do the employers in this case seek and/or experienced people. Financially, it would be in their interest to hire the cheapest labor available. Since labor costs are typically one of the most controllable

expenses in a firm's profit picture, one would predict that the tendency would be to hire machine operators if that was all that was necessary. The answer is simply that the situation is not nearly as simple, easy, and straightforward as Plaintiffs' expert would have us believe. In the words of one cannery superintendent, "what you learn to expect up here is the unexpected."

140. For example, one of the things that the Superintendents and Foremen watch very carefully is the recovery rate in the fish house. This has to do with how much usable product is left after butchering and is directly affected by the set-up and adjustment of the Iron Chink. The Foreman at BBSF indicated that the head cut adjustment can make a difference of one fish per case canned. Assuming an average fish weight of 5.8 lbs. at \$0.57 per pound, this can be a



difference of over \$300,000.00 on a 100,000 case season. Apparently, there can be false economies.

141. Every cannery needs to have a mix of skills to accomplish its work. How those skills are present among those available in the labor market will determine, to some degree, how jobs are structured each season. For example, there can be a great amount of welding work in the canneries. One can fill that need a variety of ways. One way is to hire a couple of welders. However, most of the welding is finished by the start of the season, and the salary guarantees include the season. In the alternate, one can look for people to fill other jobs who also have welding skills, and use those employees to do welding when needed. This is in fact, one of the things the defendants have done. Which people, in which jobs, have those skills can and does

vary from season-to-season. That some of the crew needs to have those skills is indisputable.

142. The point here is that jobs, and how they are structured is a fluid matter. In actual practice, jobs are often structured around the skills of the people who are available to fill them, rather than the other way around.

143. Because our conclusions on skills were stated as minimum skills reasonably required, they were stated for each position by itself. Since each incumbent's skill level can impact on the recruiting requirements for other positions, we do not believe it is reasonable, nor necessarily safe, to staff each position with people of minimum skills. Each position that is staffed with a minimally skilled person in effect requires the raising of the

requirements for other jobs in the system if the total mix is to remain in balance.

144. In other words, all things being equal, a crew of "average" capabilities and a crew half of which is minimally skilled and half "maximally" skilled will each produce "average" output. Most employers are far from satisfied in being "average" in their competitive market.

145. The analogies of the sporting world are appropriate here. It is highly unlikely, for example, that a professional basketball team would be competitive if it started a team of five rookies, unless the rookies all were people of above-average professional skills. If the rookies were all minimally skilled, or even "average" rookies, the team would be in for a tough season.

146. A good example in the present case is the composition of a tender's

crew. Plaintiffs' expert contends that people of the machine operator skill level can be hired, if the captain is skilled in engine troubleshooting, repair, and maintenance. Ignoring for a moment the fact that it is not the captain's job, it could conceivably work. If someone else on the crew can cover the captain's job while he is repairing the engine. Who should that be? Do we now require navigation and piloting skills of our deckhand, cook, or minimally skilled engine operator? And this does not even address the more safe situation in which at least two different crew members know how to repair the equipment and navigate and pilot the boat. And, of course, the other unanswered question is how many captains actually can repair the engines, not to mention the electrical and hydraulic systems? Some of the captains

we interviewed indicated that they could not.

147. Finally, we have stated that we were conservative in our establishment of skill requirements. We believe this to have been borne out by the skills requirements adopted by the court in Carpenter v. NEFCO, which are generally higher than ours, and corroborated by the requirements found by the court to be "... generally realistic and fair" in Domingo. [15].

148. It should be made clear, however, that our conservatism had to do with the fact that the matter was pending litigation. Our recommendation to clients in a normal situation (i.e., not involving litigation) would never be to hire minimally qualified employees when possible. Rather, it would be to

---

15. Opinion and Order, Domingo v. NEFCO, 7/19/79, p. 8. See also Affidavit of Patrick Vess, 4/9/79, esp. Ex. A.

eliminate from consideration any not meeting minimum requirements, and then to select the most suitable person remaining. This would be particularly true if the wages for the position were fixed, regardless of the incumbent's skills. Further it would appear to be a reasonable business practice to prefer an experienced person over a nonexperienced person all other factors being equal. Latham concurs. . . .

149. This contextual information is important, but ignored or glossed over by Plaintiffs' expert. If you are in the business of processing canned salmon in Alaska, however, it could be critical to ignore the context.

\* \* \*

[p. 3060]

BY MR. ARDITI:

Q. Now, the term machinist as it is generally used refers to a journeyman



machinist who's served an apprenticeship in the trade, and it usually means in particular a shop machinist; is that correct?

A. Generally, that would be correct.

Q. Now, cannery machinists are not machinists in that sense, are they?

A. Not all of them, no.

Q. Do you know whether they are called machinists simply because they work under the machinists contract?

Or I'll rephrase that. Simply because the name of the union that represents them is the machinists union?

A. I suspect that has something to do with it, yes.

\* \* \*

[pp. 3064-3065]

Q. So is it fair to say that in each of the major repairs that you saw in

the canneries, either the first machinist or the cannery foreman was involved?

A. They were--one or the other was involved, yes.

Q. Now, is it fair to say that some of the incumbents that you talked to about job qualifications exaggerated the difficulty of their jobs?

A. I think there was some of that, yes.

Q. And they also exaggerated the learning time for their jobs, didn't they?

A. I think that there was some exaggeration generally with some of the interviews, yes.

Q. Could you take a look at Page 15 and 16 of your affidavit?

A. Yes.

Q. Is it fair to say that the supervisors in machinist jobs were more likely to characterize the machinist job

an operative job than the incumbents were?

A. For some classifications, yes.

Q. I gather that from your table on Page 15, there is at least some room for a difference of opinion as to whether a machinist job ought to be characterized as an operative job or a skilled job?

A. That is correct. In some cases, we have overlapping frequencies here and some people said, "Well, it's a little of this and it's a little of that." But as I recall, when that occurred, they were asked to still pick the one that they thought best fit, so there was some feeling on the part of both incumbents and supervisors that there was a mix.

\* \* \*

[pp. 3066-3067]

Q. Now, you, in fact, do not know what qualifications the Defendants actually imposed, do you?

A. No. I read some interrogatory answers at one point, but I really do not beyond that.

Q. In fact, at least at the time of your December 26th, 1980, deposition, the Defendants had not imposed the qualifications that you devised; is that correct?

A. Not to my knowledge.

Q. Is it fair to say that in some sense, the qualifications that you're offering are hypothetical qualifications? At least in the sense that they were never imposed?

A. In that sense, I suppose that could be said.

\* \* \*

[p. 3071]

Q. You did an analysis of whether incumbents in certain noncannery worker jobs met your qualifications, didn't you?

A. Yes.

Q. And you in fact found that some could not, didn't you?

A. Correct.

\* \* \*

[pp. 3072-3073]

Q. In each of the jobs that you list qualifications for or asserted qualifications for, you speak of ability to do something, correct?

A. In each of the jobs that I list asserted qualifications for, I speak of ability to do something?

Q. Right.

A. Without reviewing the list, I don't recall whether there's something like that in all of them. Many of them, most of them, perhaps.

Q. Now, in some of the qualifications that you assert, you speak of mechanical experience of a similar nature, correct?

A. Correct.

Q. If that were a qualification that were actually used, would you leave it up to the employer to decide what mechanical experience of a similar nature is?

A. Not necessarily. It would depend upon who on the employer's staff was involved. Depends upon who made the hiring decision.

Q. Well, without a definition of what mechanical experience of a similar nature is, there is substantial room for discretion in deciding whether a person meets that standard or not; isn't that correct?

A. To the uninitiated, yes.

\* \* \*

[p. 3075]

Your Honor, that's a bulky exhibit so what we've done is just made excerpts or xeroxes of excerpts of it.



That's an excerpt for David Jones, who is quality control at Wards Cove, 1977 to '80; is that correct?

A. That's correct.

\* \* \*

[pp. 3076-3078]

Q. (By Mr. Arditi) That individual does not meet your requirement of a season of general cannery experience, does he?

A. No.

Q. In fact, it doesn't show any other work experience for that individual, does it?

A. No.

Q. There's no showing that the individual had any background in food technology, is there?

A. No.

Q. So is it fair to say that that individual would not have met your qualifications for quality control?

A. Yes.

Q. That's an excerpt from Mike Morgan?

A. Correct.

Q. Mr. Morgan did not have a year of cannery experience, did he?

MR. FRYER: Your Honor, this is another one where Mr. DeFrance has stated he's not qualified.

THE COURT: All right. Stipulated he's not qualified.

MR. ARDITI: We will go on to the next one, then.

Q. Do you have before you an excerpt for William Lenhardt?

A. Yes, I do.

Q. He worked as a salmon cook-pipefitter at Ekok [sic]?

A. That's correct.

Q. This does not show that Mr. Lenhardt had a year of prior pipefitting--strike that.

A year of prior plumbing experience, does it?

A. It does not, no.

Q. Nor does it show that he had a year of prior pipefitting experience, does it?

A. No.

MR. FRYER: Same stipulation, Your Honor. This also was covered.

THE COURT: All right. Stipulate he does not fit the qualifications.

Q. (By Mr. Arditi) Do you have before you the excerpt for Walter Smith?

A. Yes.

Q. He worked as a tender engineer at Bumble Bee; is that correct?

A. Now, he did not have a year of prior related boat experience, did he?

MR. FRYER: Your Honor, this is another one that we will stipulate to. It's covered in the affidavit.

THE COURT: So stipulated.

MR. ARDITI: Well, some of them are, some of them aren't.

MR. FRYER: Well, this one is. This is 533.

Q. (By Mr. Arditi) Do you have an excerpt for Joseph Plesha\*?

A. Yes, I do.

Q. Now, in 1978, he was hired as a tender engineer at Wards Cove; is that correct?

A. Yes.

Q. Prior to that, he'd not had any mechanical experience, had he?

A. Prior to?

Q. Being hired as tender engineer for the first time.

MR. FRYER: Your Honor, on this one, I would stipulate that it was Mr. DeFrance's conclusion based on the survey that he was not qualified. I won't stipulate that he wasn't qualified. But

as far as this witness is concerned, he wasn't.

THE COURT: Within the qualifications established by this witness?

MR. FRYER: Yes.

THE COURT: All right. Now, is that as to just the tender engineer position?

MR. ARDITI: Tender engineer. That is the only I'm examining him on at the moment.

\* \* \*

[pp. 3090-3091]

Q. (By Mr. Arditi) Okay, Mr. DeFrance, I'd like to turn to the census portion of your study now, if I could.

You made an effort in this case to try to cross-map jobs in this industry with census occupational categories, didn't you?

A. I believe I did that, yes.

Q. The purpose of this was to assist Dr. Albert Rees in his efforts to determine the availability of qualified non-whites for certain jobs; is that right?

A. I don't think I stated it quite that way. The purpose is stated on Page 34 of the affidavit.

Q. The purpose was to assist in determining the percentage of what the Defendants believe were qualified non-whites in the available labor supply; is that right?

A. The purpose--according to Page 34, the purpose was to establish whether or not groups of census job codes could be established which would be more likely sources of people with the requisite skill experience and/or training for cannery jobs other than



those found in general population statistics.

Q. Then it says, "If this could be accomplished, the experts who are working on the question of availability would be better able to specify the racial characteristics of the external labor market for the position in question"; is that correct?

A. That's correct.

Q. Thank you. And the results of this portion of your study are given on Pages 42 through 46; is that right?

A. Yes.

Q. Now, on Page 42, under account/bookkeep, you list adult education teachers?

A. Correct.

Q. Is it your view that by virtue of being an adult education teacher, an individual would be more likely to be

qualified than others for accounting-bookkeeping work?

A. Some of them, yes.

Q. But not all; is that correct?

A. No.

Q. So you're not saying that everyone in the census category "Adult Education School Teacher" was necessarily qualified for a bookkeeper or accountant's job, are you?

A. No. I'm saying that the people in that category are a more likely source of people with the skills than general population statistics.

Q. But we've at least established so far, I think, that these census occupational categories would be over inclusive?

A. Some of them.

\* \* \*

[pp. 3093-3094]

Q. You mentioned that the census used inexperienced coders?

A. Correct.

Q. You also mentioned that the census urged its coding specialists to use a certain amount of creativity in looking for alternate job titles that they couldn't find in the master list?

A. Correct.

Q. Now, that could have a significant impact on the reliability of the census occupational data in an industry which has a number of job titles which are not listed by the census in its Alpha index, correct?

A. Okay. Have a significant impact, period.

Q. So your answer is yes?

A. Could you repeat the question?

Q. What we've just mentioned could have a significant impact on the

reliability of census occupational data in an industry which has a number of job titles which are not listed by the census in its Alpha index, correct?

A. Yes, it could.

Q. This is in fact just such an industry, isn't it?

A. You mean in some sense different from other industries?

Q. Well, that it has job titles that are not listed on the Alpha index.

A. That's correct. There are job titles which are not listed in the Alpha index.

Q. Now, the census was taken on April 1, 1970, was it?

A. I'd have to check the date. That sounds correct.

Q. The reference week was the last week in March, wasn't it?

A. Again, I'd have to check the date, but that sounds correct, yes.

\* \* \*

[pp. 3094-3097]

Q. Let me try it again, Mr. DeFrance. In the census questionnaire, they ask, "What was your job the last week in March?" Correct?

A. I believe that's the question.

Q. And seasonal jobs in this industry would not have started the last week in March, would they?

A. That would be correct.

Q. So in all likelihood, people would not have reported their jobs in this industry, would they?

A. I think that's a link that goes to what the individual would have done. I don't think that I can speak to that. I think that that would cause some questions about the census as it relates, yes.

Q. Let me just ask it less in a general way and ask specifically.

A. All right.

Q. If you planned to go to work as a beach man at Bumble Bee in the 1970 season and you were asked to fill out a questionnaire that asked you what your job was in March, you wouldn't describe a job that you weren't working in, would you?

A. No, I would not.

Q. Now, if I understand your affidavit correctly, there are occasions when an individual might list two occupations on the census questionnaire and one would be--an example that you gave, I think, was waiter/bartender; is that correct?

A. I believe so, yes, Waitress/bartender, yes.

Q. In the event, for example, that an individual gave both his off-season employment and his seasonal employment,



which of those two jobs would be coded by the census for this industry?

A. Would depend upon the response to Question 30B.

Q. You really mean 34B, don't you? 34 or 35?

A. Yes. I believe that's an error. It's the question on the if two job titles were listed in the occupation section, they then went to the section on important activity or duties, and then the instruction was to go--as I recall, the instruction was to go with the first activity listed.

Q. So it would really be, then, a complete fortuity whether a person listed the seasonal job first or second, correct?

A. I'm not sure what you mean by a fortuity. It would depend upon what they wrote down, okay? The procedures that the census follows, the instructions to the

coders are fairly specific. But what an individual writes down, of course, depends upon the individual.

Q. It's possible, of course, that people who work in the salmon industry sometimes hold jobs in the off-season that are not related to their work in Alaska, isn't it?

A. Yes.

Q. An example would be a person who works as a warehouseman in the Lower 48 and a salmon butchering machinist in Alaska; is that correct?

A. That could be an example, yes.

Q. That person would not show up in a mechanical occupation in the census listing, would he?

A. In a mechanical occupation?

Q. Well, warehouseman would be considered an operative job.

A. It would not be classified under 278, the industry code. It would

not be classified likely as a mechanic and repairman, no. He would be classified elsewhere.

Q. Now, when a person's job, reported job was not listed on the Alpha index, the census coder would go by a very short description of the job that the respondent supplied; is that correct?

A. I would need to review the affidavit here. I believe the first thing they were instructed to do was try to think of other job titles and see if they could find them. Then in the event that could not happen, they then went to the brief description of activities and duties to try to see if that shed any light on it. And if that did not, it would go to prime referral pool. I believe that's the process.

Q. In reading that brief description, the census coders would

concentrate on the first word that appeared in the description generally?

A. They would concentrate--back to our waitress and bartender example. If the first question said waitress and bartender and the next question said wait on customers, tend bar, then they would classify it as waitress. If it was the other way around, tend bar, wait on customers, they would classify it as bartender. So it would be more than one word.

Q. Don't you give another example in there of a person who says operate and maintain machinery as opposed to maintain and operate machinery?

A. Let's see here. Okay. That--yes, that's problematic.

Q. If the person said operate and maintain, he would likely be classified as an operator, but if he says maintain

and operate, he'd be classified as a mechanic?

A. That is correct.

\* \* \*

[p. 3098]

Q. In fact, the census is not a very accurate device for determining the percentage of qualified non-whites, say, for a job like the salmon butchering machinist; is it?

MR. FRYER: I'm going to object to that question. I think that's beyond the scope of direct and beyond the affidavit, Your Honor.

THE COURT: No, I think it's all right for cross-examination. Overruled.

THE WITNESS: The census, in my opinion, is at best indicative.

Q. (By Mr. Arditi) It's not a very accurate device for that purpose, is it?

A. I would not call it conclusive.

Q. In fact, you'd have to take the census with a grain of salt as far as this is concerned, wouldn't you?

A. I think that the census as a measure of availability always should be taken with a grain of salt. It was not designed to do that.

\* \* \*

[p. 3100]

Q. If the qualifications that you suggest in this case could be shown to have an adverse impact, then you would agree that you would have to do more work on your study, wouldn't you?

A. If I could determine that the qualifications that I have established have an adverse impact, then I would want to take another look at them, that's correct.

\* \* \*



[pp. 3104-3107]

BY MR. FRYER:

Q. What was your objective in looking at the census classifications for all industries?

A. The purpose, again, was stated in the affidavit, to try to find census codes that were more likely to have people with the skills, training or experience for the cannery positions than would general population statistics.

Q. You indicated that there might be a difference between the initiated and the uninitiated in the selection process. I believe that was your word. Could you tell the Court what you mean by that?

A. Well, I believe I was responding to a question about trying to define similar experience more fully. And I think how that--first of all, the process of doing that would involve going to subject matter experts, such as the Defendants. The needs to do that would

depend upon who was doing that pre-screening and the hiring.

If I were to take the uninitiated and try to turn them loose to make a determination of similar experience, I would not be terribly comfortable. If I were to take somebody with the experience and exposure in the industry, know what that is, then I would feel differently.

In other words, I think one way to look at it is in some large companies, there is a staff person usually in the personnel department who handles pre-screening. I would not feel comfortable turning that individual loose for the first time with something that simply said "similar experience." If it was somebody with substantial industry experience, substantial mechanical experience of their own, then I would feel much more comfortable.

A-567

So it depends upon who is using that qualification and what their background is.

Q. A difference between Harold Brindle on the one hand, perhaps, and a ribbon clerk on the other?

A. Or an employment agency, yes.

Q. You mentioned a major repair at Alitak cannery?

A. That's correct.

Q. That occurred while you were there?

A. Yes.

Q. You said--was it the first machinist that was working on that?

A. That's correct.

Q. How many other machinists were at the cannery?

A. At the cannery?

Q. Yes.

A. I'm not sure how many were at the cannery. The first machinist was the

only individual there when the breakdown occurred.

Q. I see. The only person on the scene?

A. On the line, that's correct.

\* \* \*

Q. You mentioned a period of two to three weeks, I believe, within which a person could learn to use handtools. Were you talking about the use--learning the use of the tools in terms of their function or were you talking about the use of the tools correctly?

A. Well, I guess you need to make a distinction. I think you can learn to use the tools that are required to repair an automobile fairly quickly, but that doesn't mean you can fix the automobile.

Q. You indicated that the incumbents in some cases exaggerated qualifications; is that correct?

A. That's correct. That's my feeling.

Q. Did you take that into consideration in preparing your analysis?

A. Yes, sir, I did.

Q. With respect to your personal experience, have you seen a cannery in operation?

A. Yes, I have.

Q. Were you in court during Dr. Latham's testimony?

A. Yes, I was.

Q. Do you recall that he testified that one of these canneries could successfully operate with a machinist foreman, a first machinist and the rest of the staff composed of helpers?

A. Yes, I do.

Q. Do you agree with that opinion?

A. Absolutely not.

Q. Could you tell the Court why?

A. I think, first of all, the cannery foreman and the first machinist are paid to be there to supervise, not to perform the repairs.

Secondly, the availability of those people--it's not like they're right there all the time. They have other responsibilities. The helper trainees do not, in my opinion, have the experience to figure it out on their own. Some of the repairs can require more than one or two people just to effect the repair. So generally, I don't feel that that would work at all.

\* \* \*

[pp. 3109-3110]

BY MR. ARDITI:

Q. You evaluated people using the SSI survey just in jobs they held from 1970 forward; is that correct?

A. Actually, let me check the affidavit for the exact--there were two



different analyses. One based on first job hired after 1970, as I recall, and the other was first job studied after 1970. So I believe it was from 1971 forward.

Q. Let's take a look at Wayne Haverly, all right? He worked as a tender engineer from '69 to '80?

A. Correct.

Q. In evaluating him for jobs from 1970 or '71 forward, you would have counted the tender engineer experience he had previously obtained working for Bumble Bee in the first year or two that he worked there; is that correct?

A. That would have been considered along with the other things we have just discussed about him, yes.

Q. Wouldn't it in fact have been more accurate to look at his qualifications at the point that he was first hired in that job and not at some

point after he had already had it for a couple of years?

A. That's not what I was asked to do.

Q. What I'm asking you is wouldn't it, in fact, have been more accurate to do that?

A. For what purpose? Accurate for what purpose?

Q. Accurate for determining whether individuals met your certain qualifications at the time they were first hired for the job.

A. That's not what I was asked to do.

Q. So if I understand you correctly, what you were asked to do is to look at the qualifications of people and not at the time that they were first hired for that job, but to include experience that they had already acquired for that job; is that correct?

A. No. I was asked to take a look at the individuals on the SSI survey at the point of first hire after 1970 and evaluate whether their experience at that point met my qualifications, my experience requirements.

\* \* \*

[pp. 3112-3113]

Q. (By Mr. Arditi) And this is my last question. In your analysis with the SSI material, you used certain qualifications that do not appear on Pages 31 through 34 of your affidavit, correct? When you looked at cannery superintendent, for example.

A. I evaluated some jobs which I did not render a skills opinion, yes.

MR. ARDITI: Okay. Thank you.

MR. FRYER: Nothing further, Your Honor.

THE COURT: All right. Mr. DeFrance, in this case, I believe you

already testified that the Defendants have not adopted, to your knowledge, the minimum qualifications that you recommended; is that correct?

THE WITNESS: That's correct. I don't know that they have ever been adopted.

\* \* \*

[pp. 3113-3114]

THE COURT: Well, my concern, obviously, is what pursuit there was by the employer of a determination of minimum qualifications. Is that outside the scope--it appears that may be outside the scope of your assignment.

THE WITNESS: Well, again, we asked management people what they viewed as minimum skills. And we asked the incumbents that. And that was part of what we considered in reaching our opinion. But I had--once that opinion was reached, there was no discussion with

cannery personnel at all about those qualifications that we rendered the opinion on. Does that--

THE COURT: Well, was there any discussion as to the interview process as to how management went about determining what the individual's qualifications were?

THE WITNESS: No.

\* \* \*

DISTRICT COURT

TESTIMONY OF JACK AIELLO

[pp. 3163-64]

4. CREW REQUIRED. During the days of company fishermen, there were two persons required to fish a gillnetter by union contract; a skipper and a boat puller. The union contract allowed the skipper to select his boat puller.

5. QUALIFICATIONS OF SKIPPER. I believe that at least five seasons' experience is usually required to qualify one as a skipper of a gillnet boat in Bristol Bay unless the fisherman had substantial outside experience. A skipper needs to possess the following skills and knowledge. He should know how to set a course on a compass, to compensate for current, and to be able to read a chart for bearings, distances, and depth of water. He should have the



familiarity in Bristol Bay to avoid the shoals and sandbars as the shoals change from time to time due to river currents and the charts are not accurate on showing their location. He must know how much of a load of fish to take aboard and to avoid taking too many fish in rough weather because this might create a danger of swamping or capsizing. He should know how the fish show on a tide, where they move, and where the tide may take them. The skipper must know where to let a net out and how long to leave it there before bringing it in--if the net is left out too long where there are no fish, it would be better used fishing in some other area. He must be a good seaman. He must possess all the skills required of a boat puller.

6. QUALIFICATIONS OF BOAT PULLER.

In my opinion it is both inefficient and dangerous to hire an inexperienced boat puller. At least some fishing experience

is required. Bristol Bay is an area where the gillnet boats fish in a bay exposed to the open ocean and it is an area of swift currents, tides of more than 20 feet, and is full of sandbars and dangerous shoals. A boat puller must have a proven ability to avoid being seasick and should have a general knowledge of basic seamanship. A boat puller should also know how to pick fish from a net. Only by becoming adept at picking fish can one be a successful fisherman because the net cannot be set again until the fish have been picked. Experience by the boat puller does not have to be in Bristol Bay. Bristol Bay is more dangerous fishing than other much more protected areas such as the Sacramento River, the Columbia River, Puget Sound, Southeastern Alaska, and the Copper River, all of which areas have had gillnetting efforts. Gillnet fishing experience can be gained in these areas

with less danger than in Bristol Bay. Other fishing experience such as on purse seine vessels in Puget Sound or Alaska would be helpful to qualify as a Bristol Bay boat puller.

7. DANGERS OF INEXPERIENCED CREW.

In my opinion both skipper and puller should be experienced for fishing in Bristol Bay or they can be lost. Indeed many men have been lost over the years in Bristol Bay. I have always had an experienced boat puller aboard my boat. The boat puller must be knowledgeable as to possible risk and must be able to react quickly to changing conditions.

8. COMPATIBILITY. Skipper and puller shared and were paid on the basis of of [sic] fish actually delivered. By union contract (AFU), the skipper and puller were paid equally and it was regarded by both as a joint effort. They worked and lived aboard a small boat in

confined quarters and in often rough weather. To be able to work effectively as a team, it was essential that a skipper be able to select a partner who he felt was equal to his share and compatible to be with.

\* \* \*

DEPOSITION

[Dep., p. 17]

Q. Were you fish boss before or after Mr. DiMercurio?

A. After.

Q. So far as you know, Red Salmon had no written qualification for boat puller, did it?

A. No, as far as I know.

Q. And it left the hiring decisions for boat pullers to the various fish captains, correct?

A. Right.

\* \* \*

[Dep., p. 18]

Q. But aside from joining the AFU after you were hired, the fish captains were the ones who decided what their standards would be for hiring fish pullers, right?

A. That is correct.

\* \* \*

[Dep., pp. 18-19]

Q. No. You, yourself do not know what if any qualifications the company would have established before hiring started for those fish captains who were recruited from Alaska, do you?

A. There was no qualifications.

\* \* \*

[Dep., pp. 21-22]

Q. You were asked one question by Mr. Arditi and you gave a response, there was no qualifications. What did you mean when you said that?

A. Well, what I meant was that there was no instructions from the company that there was certain guidelines to take on a boat puller.

Q. Did the fishermen in your experience exercise their own judgment in taking on a boat puller?

A. You mean the skipper of the boat?

Q. Yes.

A. Yes, by all means. They wanted to protect their own lives as well as the person that they hired.

\* \* \*

[Dep., p. 22]

Q. (By Mr. Fryer) Is there any safety factor, in your opinion, in a captain selecting an experienced boat puller as opposed to one who is inexperienced?

\* \* \*



[Dep., p. 22]

A. Yes, there is.

Q. And what is that?

A. Well, for one thing, there is a lot of danger, especially in Bristol Bay. I have fished up and down the Pacific Coast, I fished inland waters in California and I have yet to see a place as dangerous as Bristol Bay. And I, myself, as a skipper would not risk my life and take on a puller with no experience. I would be losing my life, chances are, and the person that I would take that does not have the experience.

\* \* \*

[Dep., p. 27]

Q. (By Mr. Fryer) How many years experience did your son have before you took him as a puller?

A. About four years.

Q. And where did he get those years of experience?

A. Well, first, he fished in the river with me. That was sport fishing. And he fished in Puget Sound with me on a gillnetter, also.

Q. You regularly fish in Puget Sound?

A. Yes, I do.

\* \* \*

DISTRICT COURT

TESTIMONY OF LAURIE BRINDLE ROMINE

[p. 3189]

LAURIE BRINDLE ROMINE, being first duly sworn, on oath deposes and says:

\* \* \*

[p. 3189]

1. I am the daughter of Joe Brindle and I reside in Ketchikan, Alaska.

2. Beginning in 1968, I worked at the Wards Cove cannery every year except 1978 (when I did not work) and 1971 (when Wards Cove was closed and I worked at Alitak).

\* \* \*

[p. 3190]

5. I remember Clarke Kido as quiet and considerate and always got along with him.

\* \* \*

[pp. 3190-3191]

7. Clarke Kido and Lester Kuramoto used to complain because they didn't get fruit. They went up on one occasion to the other mess and just kind of barged in. They were then surprised when they weren't allowed to stay. I talked to them later and told them that they have to have some respect for the rights of others. It wasn't discrimination that kept them out, but the way they barged in.

8. I also recall an incident when Clarke, Lester, and others went up to look in and see the mugup in the main mess. They were upset because of the big layout. I told them to go talk to their foreman, but they said it didn't do any good.

9. I recall another incident when Clarke, Lester, and I were sitting on the dock in the evening and chatting. They were again discussing the food situation in the mess and the mugup. I suggested

that they attend our mugup that evening, and went to ask permission from the cook. I received such permission, returned to get Clarke and Lester, and the three of us took mugup in the main mess. I remember that they had a discussion with the cook while we were there, but I don't recall them ever asking again to attend mugup in the main mess.

\* \* \*

## DISTRICT COURT

### TESTIMONY OF ELROY KOWALSKI

ELROY KOWALSKI, being first duly sworn, on oath deposes and says:

[p. 3208]

1. I live at 6312 - 186th S.W., Lynnwood, Washington. I am Caucasian.

2. During the case period (since 1970), I have held the following machinist jobs: 1970 at CWF-Port Bailey, first machinist; 1971 at CWF-Alitak, iron chink machinist; 1972 and 1973 at CWF-Alitak, first machinist; 1974-1979 at CWF-Kenai, machinist foreman; 1979-present at Red Salmon, machinist foreman. During the 1979 season I was foreman at CWF-Kenai and then when the foreman at Red Salmon, Winnie Lessley, had a heart attack, I moved over from Kenai and Dennis Mohr took my place at Kenai. (During the 1979 season after the Red Salmon season



had ended, I returned to Kenai for three more weeks as foreman.)

\* \* \*

[pp. 3208-3211]

3. Prior to 1970, I had the following training and experience:

4. I took three years of shop courses in high school. I learned welding (gas and arc), automotive mechanics, metal fabricating, and how to work with metal lathes, drill presses, and shapers. One of my class projects in high school was to completely rebuild by father's tractor, including the engine, the rear end, and the transmission. During this period of time I also completely rebuilt my own car's engine.

5. After high school, one of the jobs I held was with Lynden Canning Company in Seattle. They canned chicken and other products. That was where I started to learn about the canning

business. While I was there one of the jobs I held was as a machinist's helper type position, working on the canning lines. I also at that time became familiar with the retorts at that cannery.

6. In about 1964 I went to Alitak to work in the hand pack crab operation the first year CWF operated the cannery. I started after the salmon season and worked the fall of 1964 and winter of 1965 in the crab operation. During 1964 I did maintenance work around the cannery, cooked the crab in the smaller crab retorts, and took care of the boiler.

7. During the winter of 1965 I worked on the canning line for the slow-speed crab hand pack operation there at Alitak. I also cooked the crab in the retorts and ran and maintained the boiler.

8. In that particular operation, we had one day full-time of maintenance and we canned the other six days. On the maintenance day we checked all of the cannery machinery and equipment, greased, oiled, cleaned the boiler flues, etc. Any repairs that needed to be done would usually be done on this day if the conditions allowed. We had three machinists: myself, the shop machinist, and a powerhouse man. The superintendent of that winter operation was Ray Landry, who had been first machinist at CWF-Ekuk for their salmon season.

9. During the salmon season in 1965, I was the fireman at Alitak. We had two hand fired boilers at Alitak and I did all the plumbing and piping in the cannery and ran the boilers.

10. As soon as the salmon season ended and the machinists left, I moved over directly to the crab line and began

assembling the crab line machinery for the winter crab operation. This took about one month.

11. During the winter of 1966 I worked in the crab operation at Alitak. That winter I ran the canning machinery myself, as well as doing the cooking of the crab in the retorts operating and maintaining the boiler.

12. During the salmon canning season of 1966 I worked as the can shop man at Alitak.

13. That fall (1966), I once again got the crab machinery ready to process crab in the coming winter. I then did the same job in the crab cannery that I had done the previous year.

14. The following salmon season (1967) I was the seamer machinist at Alitak. I held this job each season at Alitak from 1967 through 1969. In the offseason I worked for American Can

Company rebuilding cannery machinery. Some of the machinery I rebuilt included seamers, reformers, fillers, curler-clinchers, and flangers. I worked in the offseason for American Can for the off-seasons of 1967 and 1968.

15. In the fall of 1969 I started doing rebuilds of the machinery for the Brindles at the LUT yard in Seattle. The winter of 1969-1970, I rebuilt one iron chink, one filler and one cutter, and one clincher.

16. During the salmon season of 1970 I went to work at CWF-Port Bailey on the north end of Kodiak Island as the first machinist.

17. The offseason of 1970-1971, I rebuilt another iron chink, rebuilt four clinchers, one weighing machine, and one seamer at the LUT yard.

18. The salmon season of 1971 I went to Alitak as the iron chink man.

19. 1971 was a big year at Alitak. I had to do a lot of major work at the cannery. One of the things that I did was convert four iron chinks from belt drive to hydraulic drive. This was about a four week project. I did the entire job myself. This included building motor mounts, mounting the electric motors, mounting the hydraulic pumps to the motors and then installing the hydraulic motors on the chink itself, plus running the hydraulic lines from the pump to the iron chinks.

20. Every offseason after that I worked for the Brindles at LUT yard working on cannery machinery, fishing boats, tenders, and anything else that the canneries sent down for work in the offseason.

\* \* \*



[pp. 3211-3215]

21. In each of the machinist jobs I held prior to becoming first machinist (i.e., can shop machinist, seamer machinist, and iron chink machinist), I was responsible for the machinery in my area. After I became first machinist and foreman, the machinists in these jobs on my crews were also responsible for the machinery in their areas. In the can shop, this machinery includes several flangers, reformers, seamers, and a considerable amount of transport machinery, as well as supervision of the cannery workers. In the fishhouse, the iron chink machinist is responsible for all of the iron chink machines, elevators, conveyors, piping, etc, located in the fishhouse. For the seamer machinist, the responsibility entails several seamers, curler-clinchers, cooler

loaders, and conveyors on the canning lines.

22. When I was can shop man, seamer machinists, and iron chink machinist, I was expected to and did perform all major and minor adjustments, maintenance, and major and minor repairs. The only exceptions would be if we were in a real time-crunch (e.g., big load of fish on the way and the machinery is down or it's in the preseason and we're getting very close to the start of canning) or if the job required two people. In those situations, I and one of the other machinists, usually but not always the first machinist or the foreman, would provide assistance. Since I have been first machinist and foreman, this situation hasn't changed. That is, we relied on the other machinists to do their own work, unless we got into a real time-crunch or the job required two people. In

those cases, the first machinist or foreman would usually help out.

23. Some of the major work I did as iron chink machinist is described in paragraph 19. When I was seamer machinist at Alitak, some of the major work I did independently included rebuilding clutches in the preseason, replacing rolls and chucks, balancing and setting seams. These were all done on the seamers on the canning lines. Some of the major work I did on the clincher included rebuilding the top-end unit of the worm drive and setting the curler guages. I did similar types of repairs and adjustments when I was can shop man at Alitak.

24. It has been my experience that the machinist foreman cannot spend much time doing actual hands-on repairs or adjustments. The foreman's job requires broad overseeing responsibilities and he

cannot afford to be tied down working on a repair. The foreman has to rely on his crew to do that. This has certainly been true since I have been foreman at both CWF-Kenai and Red Salmon. When Wally Mullis (presently foreman at Wards Cove) was the foreman at Alitak in the late 1960's and early 1970's, he rarely if ever did hands-on adjustments and repairs. His role was almost entirely that of broad overseeing and scheduling of cannery work. His involvement with work on the machinery was usually to provide ideas to the machinists doing the work and then to go off and cover other areas of the canning operation. This was also true of John Jorgensen when he became foreman at Alitak. John had been a first machinist and was a very skilled person, but after becoming foreman, he was much less available for hands-on type work.

25. Based on my experience in the canneries, I don't think someone who came in looking for a job and said he was "comfortable with hand tools" because he had done some work on a lawnmower or tuned up his car would be qualified for a machinist job. At most, he might qualify for machinist helper/trainee. If all such a person had done was minor repairs on his car or a lawnmower, I don't think I would seriously consider him even for a machinist helper/trainee job. This is because we expect the helper/trainees to do other things around the cannery. In fact, I can't recall a single machinist helper we've had at any cannery where I've worked who didn't have some additional skills beyond being "familiar with hand tools."

26. For instance, two of the machinist helpers we have had recently at Red Salmon, Lionel Mateo and Jeff

Higgins, are both skilled welders, can do machine shop work, and pipe fitting. Having people like this on the crew to do a lot of the maintenance and minor repair work on the cannery machinery and other equipment at the camp frees up the other machinists to do the more major work. I don't think someone who was just comfortable with hand tools would really be of much use to us at the cannery.

27. I have recommended people for employment as machinists at the canneries where I've worked. I have never recommended someone for a machinist job who had just done a little work on his car. Usually, even if the person is an experienced mechanic, I don't recommend them for something other than machinist/helper. This year I was contacted by a man who was a very experienced auto mechanic about a job in Alaska. This guy was certainly more than



"comfortable with hand tools." He was a skilled mechanic. However, I only recommended him for a helper job his first year.

28. It has been my experience that even skilled mechanics take much longer than a single preseason to learn one of the machinist jobs. There is no way that someone who could just tune up his car could learn it in that period of time. The machinery and equipment is complex, high speed, and has many closely timed and inter-related parts, gears, chains, motors, cams, and shafts. Lawnmowers do not have this. Someone who had just done tune-ups or carburetor rebuilds on his car would be overwhelmed in the preseason. Someone like that would need step-by-step, over-the-shoulder, almost-constant supervision and instruction. We simply don't have the time to do that.

29. Another problem with someone trying to be a machinist who had just done a little work on his car is that he simply doesn't have the mechanical savvy to retain what he is shown at the cannery or the capacity to apply it to new situations. Thus, we couldn't just explain one principle to him and expect him to apply it to the new situations he would encounter while working on the machinery. We would have to explain and show him how to do virtually every step of the operation, repair, maintenance, or adjustment. We would have to have a skilled machinist by his side all the time. If we had to do that, then the person is really not much more than a helper. We cannot run a cannery like that.

30. I am advised by counsel that plaintiffs' expert, Dr. Latham, stated that he felt that a cannery could safely

and efficiently operate with just a first machinist and foreman, together with a machinist helper in the can shop, in the cannery, in the fishhouse, and on the salmon cook/pipe fitter job. Even if I took the four most skilled helpers I've had on my crews in the last ten or fifteen year and put them in each of those four slots, it would be impossible to safely and efficiently run the cannery. It would be complete chaos. There is no doubt in my mind that we would be unable even to get the preseason work done, let alone actually process a can of salmon with a crew like that.

31. For instance, when I was at Alitak and we were in full production, we ran two one-pound tall lines simultaneously. If we had a bad jam on the seamer and two of the three seaming heads were completely ruined, we would have to shut down that line. At Alitak if

this had occurred on the No. 1 tall line, we could only run the No. 2 tall line. This is because the configuration of the canning lines at Alitak would not allow us to run the No. 2 tall line and the half-pound line simultaneously. In other words, our production would be cut in half until we got the No. 1 line back up. When you have 300,000 to 500,000 pounds of fish waiting for processing, you really can't afford to waste any time getting the line back up. It's for that reason that we would have the seamer machinist work on one of the seaming heads and have the first machinist work on the other.

32. Even if this situation had occurred when we were just running one of the tall lines, switching over to the other tall line is not just a matter of pushing the "start button." When you have to start the other line up, you have to warm up the seamer, make sure the seamer

is pulling a vacuum, make up can codes for the clincher, install a knife in the filler, prime the machine with fish, get the weights set when the line is started, check the codes and seams, and then as processing begins you start making all the finer adjustments to the weights, start pulling seams, etc. This is not the kind of thing you can tell a helper/trainee to go do. It takes somebody with skill. You can't have the can shop man or the iron chink man or the salmon cook do it because they have their own areas to take care of during production. If you have the first machinist and seamer machinist working on the seamer, you would have to have the foreman and maybe a helper get the other line started up.

33. The situation I have just described is only one of many that can and do occur at the cannery during the season.

These types of situations can occur in any part of the cannery. You can really run into problems if the first machinist is tied up in one place and a problem occurs in another place. The first machinist just wouldn't be available. This adds to the length of time to get the repairs or adjustments made, which results in slowed or stopped production. If we get too many fish backed up, the cannery has to put the fishermen on limits, and the fish they might have caught are simply lost. Obviously, the result is very expensive for the company.

34. Although there are American Can Company representatives in Alaska, we can't and don't rely on them to come in and do the work on the American Can machinery. First of all, they could be in Dutch Harbor two days away from Bristol Bay. That isn't much help when you've got



300,000-500,000 pounds of fish on the floor that need to be processed now.

\* \* \*

[pp. 3215-3216]

35. When I stayed in the old machinists' bunkhouse (building No. 10) at Red Salmon in 1978 and 1979, our beds were the old style metal frame-with-springs with a mattress on top. You always felt like you were about to roll out of the bed. They were not comfortable like box springs and mattress beds that you get Down Below. At several of the canneries I have worked we have had old style wringer washers to do our laundry. We had these at Port Bailey, Alitak, and Kenai. My first two years at Alitak I had to put blankets over my windows to keep the sun out, because we didn't have curtains. It was pretty common around the cannery to throw a blanket up on your window. Finally my roommate and I got

smart and scrounged up some materials to cover the window.

36. I have worked with many minority machinists at the CWF and Red Salmon canneries. Some of the ones that I can recall having worked with include Chuckie Walker, an Alaska Native seamer machinist at Alitak and Port Bailey; Lewis Tang, a Chinese salmon cook for several years at Alitak; Al Samaniago, Sr., a port engineer at Alitak, Henry Maldenado, who was a port engineer at Alitak and is of Mexican descent; Edmundo Hernandez, a Mexican salmon cook at Kenai; Edgar "Andy" McCaw, a Filipino at Red Salmon who is a journeyman refrigeration mechanic, plumber, and electrician and is our present iron chink machinist; and Lionel Mateo, a machinist helper at Red Salmon. They all lived with the machinists. I don't know of any instance in which a minority machinist

lived with the cannery workers at any cannery I've been to.

\* \* \*

[p. 3267]

BY MR. ARDITI:

Q. Now, if I understand it correctly, you do not do any hiring for machinists; is that correct?

A. That is correct.

Q. Now, is it also correct to say that the first machinist helps with major repairs at Alitak when there's a breakdown that would threaten stoppage of the line?

A. Yes. When he has to, yes.

Q. Is it part of your job to make sure that the line keeps going and that the fish are canned?

A. As a first machinist or foreman?

Q. As first machinist--I mean, as foreman. Sorry.

A. Yes. Responsible for the cannery to keep processing.

Q. So you're in charge of the mechanical end of operations in the cannery?

A. Yes. Distribute the work. I distribute the work.

Q. If there was a breakdown that actually threatened the operation of the cannery, wouldn't you have to pitch in and help, too?

A. Yes, sir.

Q. In case something comes up in the course of operations that one of the machinists cannot take care of themselves--in other words, the machinists may need technical assistance--you would provide that technical assistance, wouldn't you?

A. If I'm available, yes.

\* \* \*

[p. 3269]

BY MR. ARDITI:

Q. At Alitak, how many machinists total are there in the fish house, cannery proper and the can shop?

A. Seven.

Q. Does that include the cannery foreman and the first machinist?

A. No. That's first machinist's helpers and so forth.

Q. So is it fair to say, then, that on the average, for every three and a half machinists you have in those areas, you have one supervisory machinist such as the first machinist or the cannery foreman?

A. The first machinist normally is in the cannery. And then he's got his helpers, can shop man has got his helper and the fish house man has got his helper.

Q. You're in the cannery some of the time, too?

A. Yes.

\* \* \*



DISTRICT COURT

TESTIMONY OF JOHN LUM

JOHN LUM, being first duly sworn, on oath deposes and says:

\* \* \*

[p. 3271]

1. I was born in 1918. I am of Chinese descent.

\* \* \*

[p. 3272]

7. In 1966 I was made one of the plant accountants for the Bumble Bee salmon canning facility at South Naknek, Alaska. This is a year-round position, but requires me to go to the cannery each year for approximately 3-1/2 months, and I work full time during the remainder of the year in Astoria, Oregon.

8. In 1978 I became assistant superintendent. My duties as assistant superintendent are to oversee the buying

of supplies including the food, the feeding, and housing of the workers and the fishermen at the cannery, overseeing the operation of the store, and helping out at the cannery itself whenever or wherever possible. Although I may, on occasion, discuss with the superintendent, Warner Leonardo, whether to hire certain individuals, I have no direct authority to hire. That is done solely through Mr. Leonardo. Wes Fahlstrom took over Mr. Leonardo's position in 1981.

\* \* \*

[p. 3272]

10. During all the years I have worked at Bumble Bee, South Naknek, Warner Leonardo, the superintendent, has treated me fairly and has always tried to improve things for everyone, regardless of their race.

\* \* \*

[p. 3273]

11. Housing accommodations have changed from year to year depending upon the situation. There are bedrooms in the office building and I have stayed there certain seasons. The office crew usually stays together. I have stayed in the office building and, in recent years, the rooms in the recreation hall. I have roomed with Jim Yonker, Richard Aho (storekeeper), and Wes Fahlstrom over the years. They are all white. The office building was put up in 1968 or 1969, and most of the years since then I have been housed in the office.

12. We have generally tried to improve crew accommodations over the years. Unfortunately, we have not always been able to plan which accommodations are to be remodeled first. We had a fire in the laundry, carpenter's, and machinist's bunkhouses in November 1972,

and those buildings obviously had to be replaced. New buildings were put up in 1973.

13. The bunkhouses are usually opened as the crews come in. The cannery worker crew is the last crew to come in.

14. Prior to the fire in the beachgang and carpenter quarters in 1972, those quarters were among the most crowded in camp, if not the most crowded. We had lots of complaints from the old timers who used to say that when people would sit facing each other their knees would touch. The rooms were very small.

\* \* \*

[p. 3275]

22. We often bring in temporary cannery workers from a nearby Air Force base during the peak of the season. They stay with us for up to two weeks. This group tends to be very racially mixed, although predominately white. We house

them, usually, in Bunkhouse A, the cannery worker crew quarters. They have eaten in both the upper mess and the main mess in different years, depending on what was available in any particular year. At any given time there are about 15-20 of these workers in camp at the height of the season.

\* \* \*

[p. 3275]

26. I remember Clarke Kido, Lester Kuramoto, Joaquin Arruiza, and Albert Abuan, who worked as cannery workers for Bumble Bee in the past. None of them ever talked to me about any other jobs at the cannery. Had they done so, I would have told them to see the superintendent.

\* \* \*

[pp. 3276-3277]

31. At one time we considered dispensing with the upper mess at Bumble Bee. The result was a big protest from

the cannery worker foreman, and we did not do so.

32. Since we installed the cold storage facility in 1979 and 1980, we have greatly increased the number of processing workers at the camp. We now hire about 50-60 cold storage workers from those who apply at the home office. The cold storage crew consists of approximately [sic] 20 women and 30-40 men. These workers have been a mixed racial group. They are predominantly white. Since they now reside in Bunkhouse A (men) and Bunkhouse B (women), these workers eat at the upper galley which is right next to their bunkhouses. The remainder of the persons now eating in the upper galley are those who live in Bunkhouse D. They are the members of Rudy Rodriguez's crew, which is predominantly Filipino.



33. Generally speaking, everyone else in camp eats in the main mess hall. This includes the female cannery and warehouse workers who live in Bunkhouses J1 and J2, the male cannery workers who live in Bunkhouse Z, the machinists, carpenters, beachgang, and fishermen. The temporary workers from the Air Force base who come in will eat in whichever mess hall happens to have space available that season.

34. We have had requests from a few of the people eating in the main galley to eat in the upper galley because they prefer the food there. These are usually female cannery workers. We allowed them to eat in the upper galley if there was room, but we did request that they continue to eat in that mess hall, rather than shifting back and forth daily which can cause the cooks problems--

particularly if large numbers of people do it.

35. We have a huge number of fishermen at South Naknek. Because we are never sure exactly how many of them will be eating in the main galley, we have to set aside a number of tables in the main galley for them to eat. We usually have a pretty good idea of when they will be eating in the main galley because of the opening and closing of fishing periods and the tides. (The fishermen cannot come in to shore unless the tide is in.)

\* \* \*

[p. 3279]

43. Badges are assigned to employees on the basis of crew, not race. For example, plaintiffs' Exhibit 342 lists several persons with consecutive badge numbers. These persons are of mixed races. For instance, badge no. 50, 51, and 52 are white employees in the culinary

crew. No. 53, 54, and 55 are Asian members of the same culinary crew.

44. The reason that the badge numbers of the Local 37 people are together is that we get a list of people from the union and we simply assign people numbers according to the list. Over the years, there have been white cannery workers on this list and they got a badge number according to their place on the list, not according to their race.

45. Generally what we did with the badge numbers was set aside a whole block of numbers for each group of workers, e.g., carpenters, machinists, etc. We gave the Local 37 members their badge numbers based upon the list which we receive from the union. We gave the resident cannery workers their badge numbers with the block of numbers for them in accordance with the time they arrived in camp. The Alaska Native culinary

workers did not receive badge numbers within the series of numbers assigned to resident cannery workers, most of whom are Native.

46. The references to "Native cook" in Exhibit 342 is simply a reference to the cook who cooks in the upper galley. The cook referred to there is George Falangus, who is white. I am the person who typed up that list. Some of the older members of the company and I remember decades ago when that mess hall was called the "Native galley." It has not been called that for years. The reference to "Native cook" is not a racial reference, but a reference to the cook who works in the building that was once called the "Native galley." Most of the Local 37 crew now eats in that galley, which has no Alaska Natives.

\* \* \*

[pp. 3284-3285]

BY MR. ARDITI:

Q. Mr. Lum, you're of Chinese descent, I take it?

A. Yes.

Q. Can you tell me what the salmon butchering machine is called at South Naknek?

A. Well, it's always been in the past called the iron chink.

Q. Is it still called that now?

A. Well, most--it's commonly used as iron chink, but the new name, I guess, is the salmon cleaning machine.

\* \* \*

[pp. 3285-3286]

Q. Now, you became assistant cannery superintendent in 1978; is that correct?

A. That is true.

Q. Now, by 1980, there were two additional assistant cannery superintendents, weren't there?

A. Yes. The cannery I believe has got to the point where it's quite large, so each one of us shared different duties.

Q. The other two were white, I take it?

A. Yes.

Q. They were Mr. Fahlstrom and Mr. Yonker?

A. Yes.

Q. Now, in 1980, one of the three was promoted to cannery superintendent; is that right?

A. That's right.

Q. That would be Mr. Fahlstrom?

A. Yes.

\* \* \*

[pp. 3287-3289]

Q. Now, I'd like to call your attention to the early seventies. Let's



say 1970 and 1971. Did you have two mess halls at South Naknek during that period of time?

A. I believe so, yes.

Q. One of them did you refer to as upper galley that fed the nonresident cannery workers; is that correct?

A. Yes. Both nonresident and resident cannery workers in those years.

Q. The nonresident cannery workers were largely or exclusively, almost exclusively Filipino; is that correct?

A. That is true. They consist of--they were living in the bunkhouse closest to the galley there, yes.

Q. The resident cannery workers were exclusively or almost exclusively Alaska natives; is that correct?

A. Yes.

Q. Now, did the company serve one or two menus in the upper galley during that period of time?

A. They generally always served meals exactly--similar to the one in the main galley, only in addition to that they have the Filipino cooks that cook the ethnic food that the Filipino workers like.

Q. So is it fair to say, then, that in the upper galley, they were serving American food to whoever wanted it, that might include Alaska natives?

A. Yes.

Q. And Filipino food to whoever wanted it, and that might include some of the Filipinos?

A. Include mostly the Filipinos, I believe.

Q. Now, how long have there been two mess halls at South Naknek?

A. I believe there has always been two mess halls, since they built the cannery.

Q. You started going up there in '58; is that right?

A. '58 I went up, but we did not operate the cannery that year. We were a fish camp.

Q. Did you operate in '59?

A. I did not go up in '59. I did not go back until 1966.

Q. In '66, who ate in the upper galley?

A. It would be mainly those groups of people that live in the Bunkhouse A and Bunkhouse B.

Q. Would that be for the most part the Filipino cannery workers and the Alaska native cannery workers?

A. Yes.

\* \* \*

[pp. 3290-3291]

Q. Would it be fair to characterize cold storage workers as fish processors? They hold processing jobs?

A. Yes. I would say so.

Q. The cannery workers are also fish processors, are they not?

A. Yes.

Q. Now, in 1980, the cold storage workers, the male ones, were housed in Building C at the cannery, were they not?

A. Yes, they were.

\* \* \*

[pp. 3292-3293]

Q. Of 51 who lived there, 48 were white.

A. That's what it says here. But I seem to recollect there were at least--well, four. There should have been at least four that I recollect.

Q. So would you say it's 47 white out of 51 total?

A. Probably.

Q. Now, in Building D, you also housed male cannery workers, didn't you?

A. Yes.

Q. And in 1980, of the 43--of the 47 who lived there, 43 were non-white; is that correct?

A. According to this.

Q. Does that accord with your recollection?

A. Yes.

\* \* \*

[pp. 3294-3295]

Q. What time is breakfast served in the main mess?

A. Breakfast is served at 7:15 in both messes.

Q. So workers who want to get up in the morning or who are called out to work in the morning who want to eat breakfast have to get up in time for that 7:15 breakfast, correct?

A. That's right.

Q. Incidentally, is there a bell or buzzer that rings throughout the cannery in the morning?

A. Yes. There is--you mean, for the mess or for the workers?

Q. Well, for the mess. Let's start with that.

A. Mess, yes.

\* \* \*



9

No. 87-1387

Supreme Court, U.S.

FILED

SEP 10 1988

ROBERT E. SPANGL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1988

**WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,**

*Petitioners,*

v.

**FRANK ATONIQ *et al.*,**

*Respondents.*

**BRIEF OF PETITIONERS**

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ,  
WELLS & FRYER  
Suite 3300  
1001 Fourth Avenue Plaza  
Seattle, Washington 98154  
(206) 623-5890

*Attorneys for Petitioners*

\* Counsel of Record

September 9, 1988

## QUESTIONS PRESENTED

1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not underrepresented in the at-issue jobs?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly shift the burden of proof to petitioners?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of non-racially motivated employment practices under the disparate impact model?

## LIST OF PARTIES

Petitioners are Wards Cove Packing Co., Inc., and Castle & Cooke, Inc., who were defendants in the trial court proceeding. (Claims against a third defendant, Columbia Wards Fisheries, were dismissed. This was affirmed on appeal. See fn. 1 *infra*.)

Respondents are Frank Atonio, Eugene Baclic, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Joaquin Arruiza, and Barbara Viernes (as administratrix of the Estate of Gene Allen Viernes), who were individual plaintiffs and representatives of a class of all nonwhite employees in the trial court proceeding.

## TABLE OF CONTENTS

	<u>Page</u>
Questions Presented .....	i
List of Parties .....	ii
Table of Contents .....	iii
List of Authorities .....	vii
Opinions Below .....	1
Jurisdiction .....	2
Pertinent Statute .....	2
Statement of The Case .....	3
A. Nature of the Case .....	3
B. Material Facts .....	4
C. Court of Appeals Rulings .....	11
Summary of Argument .....	13
Argument .....	15
I. Respondents Failed to Prove Discrimination Under the Disparate Impact Theory .....	15
A. Statistical Evidence That Shows Only a Con- centration of Minority Employees in Jobs Not at Issue Fails As a Matter of Law to Establish Disparate Impact of Hiring Practices Where the Employer Fills the At-Issue Jobs From Outside His Own Work Force, Does Not Promote From Within or Provide Training for Such Jobs, and Where Minority Employees Are Not Underrepre- sented in the At-Issue Jobs According to a Labor Market Analysis Accepted by the Trial Court. ....	15



## TABLE OF CONTENTS, (continued)

	<u>Page</u>
1. Petitioners' Labor Market Analysis Was More Probative Than Respondents' Comparative Statistics, Refuted Any Showing of Disparate Impact, and Should Not Have Been Ignored by the Ninth Circuit . . . . .	16
2. Allowing Proof of Racial Imbalance to Establish Disparate Impact is Inimical to the Desirable Purposes of Title VII, and Provides an Unreasonable and Unworkable Standard in Practice . . . . .	21
3. Respondents' "Separate Hiring Channels" Argument is a Red Herring: Where Respondents Have Failed to Show That the Petitioners' Practices for Filling Jobs Not at Issue Either Intentionally or in Effect Excluded Nonwhites from Jobs At Issue, Those Practices Are Irrelevant . . . . .	22
B. Respondents Failed to Prove a Practice of "Nepotism" Existed, Their Statistics Purporting to Show Its Existence Were Properly Rejected, and The Ninth Circuit Committed Error in Finding Otherwise . . . . .	24
C. Respondents Failed to Prove Unlawful Discrimination Under the Disparate Impact Theory in Housing, Messing, or So-Called "Racial Labeling" . . . . .	27

## TABLE OF CONTENTS, (continued)

	<u>Page</u>
II. Allowing Respondents to Challenge the Cumulative Effect Of An Entire Range of Non-Racially Motivated Employment Practices Based Merely On A Showing The Petitioners' Work Force Reflects An Uneven Racial Balance Is An Improper Application Of The Disparate Impact Model, Unfairly Allocates The Burdens of Proof And Encourages Conduct At Odds With The Purposes of Title VII . . . . .	30
A. Respondents Are Required to Prove the Causal Effect of Each Practice They Choose to Challenge Under the Impact Model . . . . .	30
B. Dispensing With the Causation Requirement for Plaintiffs Places an Unfair Burden on Employers, and Encourages Conduct at Odds With Title VII's Purpose . . . . .	34
III. The Ninth Circuit Improperly Shifted The Burden Of Proof To Petitioners . . . . .	37
A. Respondents Did Not Meet the Initial Requirements to Establish An Impact Case . . . . .	37
B. The Ninth Circuit's Decision Conflicts With the Order of Proof Requirements of <i>Burdine</i> . . . . .	38
C. Respondents' Evidence Was Not Adequate Under Either Impact or Treatment Order of Proof Requirements . . . . .	41

## TABLE OF CONTENTS, (continued)

	<u>Page</u>
D. It Was Not Petitioners' Burden to Show Lack of Qualifications of the Respondents Nor Should Petitioners Be Required to Target Labor Sources Chosen by the Court of Appeals to Maximize Minority Hiring . . . . .	43
E. Clarification of the Order of Proof . . . . .	46
Conclusion . . . . .	48

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Table of Cases</b>	
<i>American Federation of State, County &amp; Municipal Employees (A.F.S.C.M.E.) AFL-CIO v. State of Wash.</i> , 770 F.2d 1401 (9th Cir. 1985) . . . . .	30
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) . . . . .	22, 39
<i>Allen v. Prince George's County, Md.</i> , 737 F.2d 1299 (4th Cir. 1984) . . . . .	21
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) . . . . .	21, 26
<i>Asbestos Workers, Local 53 v. Vogler</i> , 407 F.2d 1047 (5th Cir. 1969) . . . . .	25
<i>Bonilla v. Oakland Scavenger Co.</i> , 697 F.2d 1297 (9th Cir. 1982) . . . . .	25
<i>Carroll v. Sears, Roebuck &amp; Co.</i> , 708 F.2d 183 (5th Cir. 1983) . . . . .	18, 24, 30, 31
<i>Castaneda v. Partida</i> , 430 U.S. 482 (1977) . . . . .	20
<i>Clady v. County of Los Angeles</i> , 770 F.2d 1421 (9th Cir. 1985), cert. denied, 475 U.S. 1109 (1986) . . . . .	35
<i>Clark v. Chrysler Corp.</i> , 673 F.2d 921 (7th Cir. 1982) . . . . .	19, 20, 32
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) . . . . .	31, 32
<i>Contreras v. City of Los Angeles</i> , 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) . . . . .	17, 29

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	<u>Page</u>
<i>Coser v. Moore</i> , 739 F.2d 746 (2d Cir. 1984) . . . . .	20, 45
<i>De Medina v. Reinhardt</i> , 686 F.2d 997 (D.C. Cir. 1982) . . . . .	19
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) . . . . .	17, 31, 44, 47
<i>E.E.Q.C. v. American Nat'l Bank</i> , 652 F.2d 1176 (4th Cir. 1981) . . . . .	17
<i>E.E.Q.C. v. Federal Reserve Bank of Richmond</i> , 698 F.2d 633 (4th Cir. 1983), <i>rev'd on other grounds sub nom Cooper v. Federal Reserve Bank of Richmond</i> , 467 U.S. 867 (1984) . . . . .	19, 20, 45
<i>E.E.Q.C. v. Sheet Metal Workers, Local 122</i> , 463 F. Supp. 388 (D. Md. 1978) . . . . .	25
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) . . . . .	46
<i>Garcia v. Gloor</i> , 618 F.2d 264 (5th Cir. 1980), <i>cert. denied</i> , 449 U.S. 1113 (1981) . . . . .	29
<i>Gibson v. Local 40 Supercargoes &amp; Checkers, etc.</i> , 543 F.2d 1259 (9th Cir. 1976) . . . . .	24, 25
<i>Green v. USX Corp.</i> , 843 F.2d 1511 (3d Cir. 1988) . . . . .	40
<i>Griffin v. Carlin</i> , 755 F.2d 1516 (11th Cir. 1985) . . . . .	35, 40
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) . . . . .	16, 31, 35, 42, <i>passim</i>
<i>Hammon v. Barry</i> , 826 F.2d 73 (D.C. Cir. 1987) . . . . .	13

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	<u>Page</u>
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977) . . . . .	18, 19, 20, 21, <i>passim</i>
<i>Hilton v. Wyman-Gordon Co.</i> , 624 F.2d 379 (1st Cir. 1980) . . . . .	20
<i>Johnson v. Transp. Agency</i> , 480 U.S. ____ , 108 S.Ct. ____ , 94 L. Ed. 2d 615 (1987) . . . . .	19, 20, 46
<i>Johnson v. Uncle Ben's, Inc.</i> , 628 F.2d 419 (5th Cir. 1980), <i>vacated and remanded</i> , 451 U.S. 902 (1981), <i>aff'd on remand</i> , 657 F.2d 750 (5th Cir.), (1981), <i>cert. denied</i> , 459 U.S. 967 (1982) . . . . .	18, 19, 38
<i>Kaplan v. Int'l Alliance of Theatrical &amp; Stage Employees</i> , 525 F.2d 1354 (9th Cir. 1975) . . . . .	43
<i>Markey v. Tenneco Oil Co.</i> , 707 F.2d 172 (5th Cir. 1983) . . . . .	20
<i>Moore v. Hughes Helicopters, Inc.</i> , 708 F.2d 475 (9th Cir. 1983) . . . . .	18, 20, 38, 44
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) . . . . .	29, 37
<i>Puck v. Energy Research &amp; Dev. Admin.</i> , 566 F.2d 1111 (9th Cir. 1977) . . . . .	20, 44
<i>Personnel Administrator of Mass. v. Feeney</i> , 442 U.S. 256 (1979) . . . . .	15
<i>Pouncy v. Prudential Ins. Co. of America</i> , 668 F.2d 795 (5th Cir. 1982) . . . . .	17, 30, 31, 34



## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	<u>Page</u>
<i>Presseisen v. Swarthmore College</i> , 442 F.Supp. 593 (E.D. Pa. 1977), <i>aff'd</i> , 582 F.2d 1275 (3rd Cir. 1978) . . .	27
<i>Rivera v. City of Wichita Falls</i> , 665 F.2d 531 (5th Cir. 1982) . . . . .	18, 19, 20
<i>Robinson v. Polaroid Corp.</i> , 732 F.2d 1010 (1st Cir. 1984) . . . . .	30, 31
<i>Scott v. Pacific Maritime Ass'n</i> , 695 F.2d 1199 (9th Cir. 1983) . . . . .	27
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984), <i>cert.</i> <i>denied sub nom Meese v. Segar</i> , 471 U.S. 1115 (1985) . . . . .	39, 40
<i>Shidaker v. Carlin</i> , 782 F.2d 746 (7th Cir. 1986) . . . . .	17
<i>Spaulding v. Univ. of Wash.</i> , 740 F.2d 686 (9th Cir. 1984) . . . . .	30
<i>Speasu v. Merchants Bank &amp; Trust Co.</i> , 188 N.C. 524, 125 S.E. 398 (1924) . . . . .	42
<i>Ste. Marie v. Eastern R. Ass'n</i> , 650 F.2d 395, (2d Cir. 1981) . . . . .	45
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) . . . . .	18, 26
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) . . . . .	35, 37, 38, 39, <i>passim</i>

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	<u>Page</u>
<i>United States v. Jacksonville Terminal Co.</i> , 316 F. Supp. 567 (M.D. Fla. 1970), <i>aff'd in relevant part,</i> <i>rev'd &amp; remanded on other grounds</i> , 451 F.2d 418 (5th Cir. 1971), <i>cert. denied</i> 406 U.S. 906 (1972) . . . . .	25
<i>United States v. Ironworkers Local 1</i> , 438 F.2d 679 (7th Cir.) <i>cert. denied</i> , 404 U.S. 830 (1971) . . . . .	24
<i>Wang v. Hoffman</i> , 694 F.2d 1146 (9th Cir. 1982) . . . . .	43, 44
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 487 U.S.____, 108 S.Ct.____, 101 L. Ed. 2d 827 (1988) . . . . .	16, 17, 22, 29, <i>passim</i>
<b>Statutes</b>	
28 U.S.C. § 1254 (1) . . . . .	2
§ 1331 . . . . .	2
42 U.S.C. § 2000e, <i>et seq.</i> , Civil Rights Act of 1964 (1981) . . . . .	2-3, 14
42 U.S.C. § 1981, Civil Rights Act of 1866 (1981) . . . . .	3, 4
<b>Textbooks</b>	
Fed. R. Evid. 301 . . . . .	37, 41
9 Wigmore, <i>Evidence</i> , § 2487 (1981) . . . . .	42
§ 2491 (3d ed. 1940) . . . . .	41
§ 2493C (1981) . . . . .	41

## TABLE OF AUTHORITIES, (continued)

Other Authorities	<u>Page</u>
B. Schlei & P. Grossman, <i>Employment Discrimination Law</i> (2d ed. 1983) . . . . .	24
 Miscellaneous	
<i>Webster's Third New International Dictionary of the English Language Unabridged</i> . . . . .	24

IN THE  
Supreme Court of the United States

---

October Term, 1988

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

---

BRIEF OF PETITIONERS

---

OPINIONS BELOW

On October 31, 1983, the United States District Court for the Western District of Washington (Quackenbush, J.) entered an opinion following a nonjury trial. Pet. App. I. *See* n. 3, *infra*. An order correcting the opinion and judgment in favor of petitioners was entered December 6, 1983. Pet. App. II. The District Court's decision was published at 34 E.P.D. ¶ 34, 437 (Commerce Clearing House, Inc.). The opinion of the Court of Appeals affirming the judgment was published at 768 F.2d 1120. Pet. App. III. An order that withdrew the opinion and ordered rehearing *en banc* was published at 787 F.2d 462. Pet. App. IV. An opinion of the *en banc* Court of Appeals was published at 810 F.2d 477. Pet. App. V. An opinion of the panel of the Court of Appeals on remand from the *en banc* panel was published at 827 F.2d 439. Pet. App. VI. An order clarifying the opinion was entered on November 12, 1987, Pet. App. VIII, and a petition for rehearing denied. Pet. App. IX.

## JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. § 1331. The decision of the Court of Appeals sought to be reviewed was entered on September 2, 1987. Pet. App. VI. A timely petition for rehearing was filed on September 16, 1987, Pet. App. VII, and the petition was denied on November 12, 1987. Pet. App. IX. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

## PERTINENT STATUTE

Plaintiffs' claims arise under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\*\*\*

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group

on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

## STATEMENT OF THE CASE

### A. Nature of the Case.

The respondents in this class-action suit are former employees of several salmon canneries in Alaska. They brought this action against their former employers, petitioners Wards Cove Packing Company, Inc., and Castle & Cooke, Inc.<sup>1</sup> charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any time since March 20, 1971, employed at any one of five canneries.<sup>2</sup>

<sup>1</sup> Title VII claims against a third defendant, Columbia Wards Fisheries, were dismissed and a judgment was entered in its favor on the claims brought under 42 U.S.C. § 1981. Plaintiffs' Petition for Writ of Certiorari on these claims was denied April 4, 1988 (No. 87-1388).

<sup>2</sup> These canneries are Bumble Bee at South Naknek (owned by Castle & Cooke, Inc.); Wards Cove and Red Salmon (owned by Wards Cove Packing Co., Inc.), and Alitak and Ekuk (operated by dismissed-defendant Columbia Wards Fisheries).



Following a lengthy non-jury trial, the trial court found that plaintiffs had not established discrimination under § 1981 or Title VII and judgment was entered for petitioners. The Ninth Circuit affirmed this decision, but on rehearing *en banc* resolved a conflict within the circuit by determining that the impact analysis could be applied to subjective employment practices and remanded to the original panel. The subsequent panel decision vacated the judgment and remanded to the district court with directions to apply the disparate impact analysis in a manner inconsistent with decisions of this Court and in conflict with other circuits.

### B. Material Facts.

The salient facts may be found in the detailed findings of the District Court (Pet. App. I:1-43).<sup>3</sup> See also the Court of Appeals summary (Pet. App. III:3-9). Petitioners operate salmon canneries and fish camps in remote and widely separated areas of Alaska. Of eleven facilities, five were certified for this class action, and three remain in the litigation. See n. 1, 2, *supra*. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Petitioners' head office and support facilities are located at Seattle, Washington, and Astoria, Oregon.

Throughout the case period, minorities have held top positions with petitioners, including three at the superintendent

<sup>3</sup> The following abbreviations are used herein for citations to the record: "Pet. App." refers to the Appendices attached to the Petition for Writ of Certiorari; "J.A." refers to the Joint Appendix filed herewith; "E.R." refers to the Excerpt of Record lodged with the Court which contains certain trial exhibits that did not lend themselves to the Joint Appendix format; "Ex." refers to trial exhibits; "R.T." refers to the Reporter's Transcript of the trial; "FF" refers to the District Court's Findings of Fact; "Dep." refers to a Deposition transcript offered in lieu of live testimony at trial; and "Tbl." refers to a Table in a composite statistical exhibit.

level.<sup>4</sup> At petitioners' Alaska facilities combined, for the period 1971-80, minorities were nearly 24% of the new hires in the at-issue jobs — the jobs from which respondents claim minorities were excluded.<sup>5</sup> The five class facilities combined hired nearly 21% nonwhites, and each of the three remaining canneries hired from 10%-18% nonwhites in those jobs.<sup>6</sup>

The manner in which petitioners operate is dictated in large part by geography and nature: until the long Alaska winter is over in late April and early May, petitioners can do little at the canneries to prepare them for the salmon run.

Based upon the size of the predicted run for the coming season, management will decide whether to open a particular facility for canning and, if so, how many canning lines to run, tenders to operate, and employees to hire. Pet. App. I:16-18. Three canneries (Red Salmon, CWF-Ekuk, and South Naknek) are located in Bristol Bay in the southeast corner of the Bering Sea, north of the Aleutian Islands. One cannery is located on Kodiak Island (CWF-Alitak) and one at Ketchikan (Wards Cove). Pet. App. I:5, 6.

Of the class facilities, Red Salmon, South Naknek, and Wards Cove were closed for canning during certain years in the case period but did operate as fish camps.<sup>7</sup> Pet. App. I:18, FF 18.

<sup>4</sup> R.T. 1122, 2862, 2889-90, 2439-40, 3271-72.

<sup>5</sup> Ex. A-403, Tbl. 22 (E.R. 13).

<sup>6</sup> *Id.* Tbl. 23, 1, 2, 5 (E.R. 14, 10-12).

<sup>7</sup> A fish camp is a support base for tenders and fishing vessels. It performs no processing. Many at-issue jobs are held at the fish camps: e.g., beachgang, carpenters, cooks, tender crews, and fishermen. There is no racial stratification between cannery and at-issue jobs because no canning is performed and Local 37 has no contract for any jobs. Accordingly, respondents did not name the fish camps at Egegik, Moser Bay, Craig, and Chignik as class facilities.

Each facility is a self-supporting installation where the employees are housed and fed by the company. The canneries must rely almost entirely upon their own on-site employees to maintain and repair the cannery buildings and equipment.

There are two general categories of jobs: cannery worker and laborer jobs which are not at issue, and non-cannery jobs which *are* at issue. (Pet. App. I:28, FF 82.) The non-cannery workers are hired during the winter and early spring and sent to Alaska during the preseason. The cannery workers are not needed until several weeks later when the salmon run actually commences.

The non-cannery workers include such jobs as carpenters, machinists, tender crews, and a beachgang. During the preseason, these personnel drive piling, launch boats, get the machinery running, and repair and de-winterize the cannery. They are housed in bunkhouses insulated and heated for the cold spring weather. The preseason is an intense period between the winter "break up" and the commencement of the salmon run, and there is no time to train unskilled workers for skilled jobs. (Pet. App. I:18-19). The non-cannery workers are hired laterally from an external labor market. (Pet. App. I:39, FF 112.) This hiring is done during the first three months of the year and requires availability by the end of April. (Pet. App. I:30, FF 86.)

In June, after the canneries are in operating condition, nonresident (outside Alaska) cannery workers are mostly hired through Local 37, I.L.W.U.<sup>8</sup> They are transported to Alaska in time to process the first of the salmon caught. Resident cannery workers were hired in the early case period from the

<sup>8</sup> Local 37 did not have a contract with Ekuk. Pet. App. I:32, FF 91.

areas near the canneries.<sup>9</sup> When cannery workers arrive, additional bunkhouses are opened for them. These are bunkhouses suited for the summer weather. (Pet. App. I:83-84, FF 149 A-B.) During the season, which will last from three weeks to two months, most employees, both cannery and non-cannery workers, have season guarantees in their union contracts, a fact which inhibits transfers across union lines during the season because it would require the employer to pay an additional guarantee. (Pet. App. I:39, FF 111.) There are few midseason vacancies, and transfers across departmental lines during the season, and even between seasons, is rare. (Pet. App. I:34, FF 98, 99.)

As soon as the salmon run ends, the cannery workers are discharged and sent home; the non-cannery workers then haul out the boats, sail the tenders south,<sup>10</sup> and winterize the canneries.

The union contracts for the carpenters, machinists, tender crews, culinary crews, and also for Local 37 have rehire preference clauses which operate like a seniority system. (Pet. App. I:29-31, 35, FF 85, 87, 101.) This rehire preference clause obligates the petitioners to rehire satisfactory employees in the same job for the upcoming season and this accounts for nearly one-half the hires for at-issue jobs.<sup>11</sup>

<sup>9</sup> As pointed out by the District Court, the racial composition of the hires of Alaska residents is largely dictated by geography (Pet. App. I:38). Some canneries hired few local residents as cannery workers — Red Salmon hired only 18 nonwhite Alaska residents out of 338 total new hires during the entire case period. Ex. 497, Tbl. 3(b) (E.R. 16).

<sup>10</sup> Some tenders move on to other canneries for later seasons. Respondents' comparative statistics sought to count each tender crew member on arrival at each cannery as a new hire. The District Court was not impressed with this. Pet. App. I:120.

<sup>11</sup> See Ex. A-320 (a), p.5, col. "same dept., same job" (40% of at issue jobs filled by rehires).



Although the labor market for cannery worker and laborer jobs is 90% white, nonwhites are greatly overrepresented in these jobs because of institutional factors: Local 37 is dominated by Filipinos as are the crews it dispatches, and the geographic areas surrounding most of the canneries are heavily nonwhite. (Pet. App. 1:36-39, FF 105-109.)<sup>12</sup>

Petitioners, however, do not exclude members of Local 37 or Alaska Natives from consideration for at-issue jobs.<sup>13</sup> For instance, respondent Atonio originally obtained a cannery worker job through Local 37; later, after two untimely oral requests for other jobs, he made a timely application and was hired first in the beachgang and later as a tender deckhand. He was rehired for a job as deckhand in 1981, but quit before the boat departed. (Pet. App. 1:87-88, FF 159.)

For at-issue jobs, petitioners obtain many more applications than there are vacancies. (Pet. App. 1:31, FF 89). Consequently, petitioners do not advertise; however, the Alaska

<sup>12</sup> As the District Court found (Pet. App. 1:38) and the panel also recognized (Pet. App. III:32), Alaska Natives comprise a high percentage of local labor market for resident cannery workers at the remote canneries. For example, at Ekuk, the most remote cannery, of the Alaska residents hired as cannery workers, 97% were nonwhite, Ex. A-497, Tbl. 3(b) (E.R. 16); at the same cannery for Alaska residents hired for at-issue jobs, 91.6% were nonwhite (J.A. 290-91; Ex. A-501, Tbl. 2(A)).

By comparison, at Wards Cove, located near the city of Ketchikan, the majority of Alaska residents hired for cannery worker jobs were white (402 out of 471 openings). Ex. A-497, Tbl. 3(b) (E.R. 16).

<sup>13</sup> Of Alaska residents hired, Alaska Natives filled 60% of the at-issue jobs and 60% of the cannery worker and laborer jobs overall. Ex. A-501, Tbl. 1(A); J.A. 290-91, ¶ 45. The hiring of nonwhites for at-issue jobs is far in excess of their availability in the labor market for Alaska. Nonwhites only comprise 15.6% of that market. J.A. 290-91; Ex. A-501, Tbl. 18.

Unemployment Service has been called. (Pet. App. 1:28-29, FF 83.) Petitioners do accept walk-in applicants and referrals from unions. R.T. 2769, 2771; Dep. Lessley, p. 7, J.A. 15. There is not time to post openings during the season because the job needs to be filled immediately and management cannot wait for an interview structure. R.T. 1135; 2772; Pet. App. 1:34, FF 96.

In 1974 respondents commenced a class action against petitioners. The suit mounted a broad-scale attack against the gamut of petitioners' employment practices. Respondents identified 16 "practices"<sup>14</sup> which they contended caused an imbalance and thus a "concentration" of nonwhites in the lower-paying cannery worker jobs. Respondents used comparative statistics to argue that of the total work force, the majority of the nonwhites were concentrated in the lower-paying jobs and that there should have been a balance of 50% white/nonwhite employees in all job classifications.

After 12 trial days, in which more than 100 witnesses testified, over 900 exhibits were admitted, and over 1,000 statistical tables were submitted, the trial court entered extensive findings of fact in a 73-page opinion. Pet. App. I:<sup>15</sup> The findings determined that respondents' comparative statistics were of little probative value; that the labor supply for petitioners' facilities is approximately 90% white; that minorities were not underrepresented in the at-issue jobs; that cannery workers are not the appropriate comparison labor pool for

<sup>14</sup> In the Revised Pretrial Order, plaintiffs listed word-of-mouth recruitment, separate hiring channels, nepotism, termination of Alaska Natives, rehire preference, retaliatory terminations, menial work assignments, fraternization restrictions, housing, messing, English language requirement, race labeling, subjective hiring criteria, lack of formal promotion practices, failure to post jobs, and discrimination in pay in certain jobs.

<sup>15</sup> Although respondents contended there was discrimination against Alaska Natives, not a single Alaska Native testified in plaintiffs' case. Only petitioners called Alaska Natives to the witness stand. *E.g.*, J.A. 414.



at-issue jobs; that petitioners hire from an external labor supply and do not either promote-from-within or train inexperienced, unskilled workers for at-issue jobs; that the jobs are not fungible and most jobs at issue require skill and prior experience that is not readily acquirable at the canneries; that Local 37 provides an oversupply of nonwhite cannery workers and that this overrepresentation is an institutional factor in the industry.

In addition, the trial court found that no individual instances of discrimination were proven; that petitioners did not give job preference to friends and relatives; that respondents' "nepotism" statistics were distorted and unreliable; that hiring was "on the basis of job-related criteria";<sup>16</sup> that giving experienced personnel a preference in hiring was a business necessity; that the rehire preference clauses in the union contracts operated like a seniority system; that housing is not racially segregated, that housing and rehire policies were dictated by business necessity; and that Local 37 was responsible for messing.

The trial court found that respondents had failed to establish intentional discrimination and the disparate impact analysis was not appropriate for application to respondents' wide-ranging multiple practice challenge nor to subjective hiring practices. In applying the impact analysis individually to five of petitioners' practices (rehire preference, English language, "nepotism," housing, and messing), the District Court again found in favor of petitioners. (Pet. App. I:102-107, 124-129.)

The court found that petitioners had not discriminated on the basis of race and entered judgment in their favor. (Pet. App. I:130.)

<sup>16</sup> This finding was supported by substantial evidence. *E.g.*, petitioners' skill expert DeFrance analyzed the skills necessary for several job classifications. He then compared a survey of incumbents and found that of 139 persons for which adequate information was available, 131 did possess the requisite skills and 8 were not qualified. R.T. 2988. This finding was also uniformly supported by testimony of management, supervisors, and incumbents, who testified to the need to hire persons with prior skill and experience in the at-issue jobs. *E.g.* J.A. 161; 439-443; 596-607.

### C. Court of Appeals Rulings.

On appeal a panel of the Ninth Circuit affirmed the judgment. Pet. App. III:56.

The Court of Appeals recognized that respondents had failed in their labor market proof, that respondents' comparative statistics were of little probative value, that nonwhites were overrepresented in cannery worker jobs, and that institutional factors distorted the racial composition of the work force. Pet. App. III:20-36. The petitioners' labor market statistics and findings thereon by the District Court were affirmed,<sup>17</sup> as were the findings that respondents had not given friends or relatives a preference in hiring and that petitioners hired according to job-related criteria. The panel concluded:

The [district] court stated, "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job-related criteria." Thereafter, in concluding the case, the [district] court encompassed all of the claims when it said "defendants did not discriminate in the hiring, firing, promoting, or paying . . ." The decision of the District Court will not be disturbed."

Pet. App. III:39-40.<sup>18</sup>

This holding would seem to have disposed of respondents' claims regardless of the analytical theory on which presented. The panel noted, however, a conflict in decisions of several circuits and within the Ninth Circuit itself as to whether the disparate impact analysis could be applied to subjective

<sup>17</sup> None of the findings of fact by the District Court were overturned as clearly erroneous.

<sup>18</sup> The court also held "the ultimate fact, that there existed no pattern or practice of discrimination in hiring, promoting, paying, and firing, is supported by the numerous subsidiary findings of the District Court." Pet. App. III:38.

practices. Pet. App. III-46-55. A petition for rehearing *en banc* was granted, Pet. App. IV, and the *en banc* court subsequently held that the impact analysis could be applied to subjective employment practices. The case was returned to the original panel. Pet. App. V:39.

On remand the Court of Appeals panel affirmed the District Court on rehire preferences, did not discuss the English language requirement, but held that plaintiffs' "comparative statistics," which showed only a concentration of minorities in the cannery worker jobs, were nonetheless adequate to force petitioners to prove their hiring practices were justified on grounds of business necessity. In doing so, the Court of Appeals did not hold that any practice caused disparate impact, and ignored the District Court's findings that respondents' statistics were distorted and unreliable, that petitioners hired more nonwhites than the proportion available in the labor supply, and that institutional factors, not the petitioners' practices, caused an overrepresentation of minorities in cannery worker jobs. Pet. App. VI.

The court also held, contrary to trial court findings, that a preference for relatives ("nepotism") existed and had an adverse impact on nonwhites. Finally, the court questioned the District Court's findings of business necessity for petitioners' housing and messing practices, but did not hold them to be clearly erroneous. The Court of Appeals selected seven of the 16 practices complained of by respondents to be examined under a business necessity standard. (Word-of-mouth recruitment, nepotism, subjective criteria, separate hiring channels, labeling, housing, and messing.) The Court of Appeals vacated judgment for petitioners and remanded. Pet. App. VI.

## SUMMARY OF ARGUMENT

Although they mounted a broad scale attack on behalf of over 2,000 class members, respondents were unable to prove any instance of individual or class-wide disparate treatment of nonwhite employees in any aspect of the employment relationship. Respondents' fall back position was to allege under the disparate impact theory that their same marginal evidence proved petitioners' practices combined to cause unintentional discrimination.

Respondents' impact case was centered on comparative statistics showing internal work force comparisons. The Court of Appeals held that these statistics were sufficient to raise an "inference" of discrimination under the disparate impact model. The Court of Appeals fashioned a new allocation of the order of proof. This order of proof erroneously establishes a much lower threshold for a plaintiff in Title VII litigation than has been developed under decisions of this Court and the courts of appeal. It deprives the employer of the usual defenses, *e.g.*, that the plaintiff's statistics are flawed, that the relevant labor market shows minorities are not underrepresented in at-issue jobs, and that the inferences urged by plaintiff are less probative than those urged by the employer.

The District Court properly considered the structure and practices of respondents' business and in a carefully reasoned opinion found that the imbalance was nothing more than the result of institutional factors which produce an overrepresentation of minorities in cannery worker jobs.

The District Court properly rejected respondents' statistics in favor of petitioners' labor market analysis that showed that class members were not underrepresented in the jobs at issue. The District Court also found that respondents had failed to prove a discriminatory preference for relatives existed and rejected respondents' statistical evidence on that issue as flawed. In rehabilitating respondents' case under the impact



theory, the Ninth Circuit ignored the foregoing findings, as well as a long line of decisions of this Court and the circuit courts that supported the District Court's action.

The Ninth Circuit improperly allowed respondents to extend the reach of the disparate impact analysis to challenge the cumulative effect of a wide range of practices respondents chose to name. Respondents have the burden of proving the causal connection between any challenged practice and the alleged disparity, but the Court of Appeals decision effectively dispenses with that requirement. Combined with its acceptance of respondents' evidence of racial imbalance in job categories, the Ninth Circuit has forced the employer to shoulder the burden of justifying each practice the respondents choose to name based on a mere showing that the employers' work force is not racially balanced. This is at odds with the Congressional purpose stated in Title VII, 42 U.S.C. § 2000e-2(j), and all but compels employers to engage in quota hiring and other activities that *reduce* job opportunities for minorities.

Any doubt that the Ninth Circuit was revolutionizing the allocation of burdens of proof was removed when it held, without relevant authority, that any attempt by an employer to explain or justify his practices in response to respondents' disparate *treatment* claim, precluded the employer from challenging respondents' *impact* case; by ruling that employers must prove the business necessity of job qualifications without requiring respondents to prove the qualifications had a disparate impact; and requiring respondents to justify why they did not use certain labor sources that the Court of Appeals apparently decided might result in increased minority hiring — in the face of the fact that minorities were not underrepresented in the jobs at issue. This misallocation of the burdens of proof conflicts with decisions of this Court and the circuit courts and should be rejected.

## ARGUMENT

### I. Respondents Failed to Prove Discrimination Under the Disparate Impact Theory

The linchpin of respondents' case is the undisputed fact that nonwhites are overrepresented in the cannery worker category. That one fact, reflected in various forms in respondents' statistics, is the foundation of their claim that nonwhites are disproportionately excluded from at-issue jobs and are racially segregated in housing and messing. That overrepresentation is caused by institutional factors in the industry and is without legal significance. Because respondents' other evidence failed to establish that nonwhites were excluded from the at-issue jobs by any identified practice, their impact case must fail — particularly since petitioners met their burden of justifying many of the practices respondents challenged in the aggregate.

#### A. *Statistical Evidence That Shows Only a Concentration of Minority Employees in Jobs Not at Issue Fails As a Matter of Law to Establish Disparate Impact of Hiring Practices Where the Employer Fills the At-Issue Jobs From Outside His Own Work Force, Does Not Promote From Within or Provide Training for Such Jobs, and Where Minority Employees Are Not Underrepresented in the At-Issue Jobs According to a Labor Market Analysis Accepted by the Trial Court.*

The trial court found against respondents on the treatment theory, *i.e.*, the petitioners did not intentionally discriminate against the class or any individual class member in the adoption of or application of any of the employment practices challenged by respondents here.<sup>19</sup> This decision was affirmed on appeal.

<sup>19</sup> Thus, for instance, plaintiffs alleged, but did not prove that employers hired nonresident cannery workers through Local 37, ILWU "because of, rather than in spite of" the predominantly Filipino composition of that union, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), and they failed to establish that any similarly situated employees were treated differently on the basis of race under any practice challenged.



Nonetheless, certain practices that are fair in form and are equally applied may have a "disparate impact" on Title VII protected class. That is, they "may in operation be functionally equivalent to intentional discrimination." *Watson v. Ft. Worth Bank & Trust*, 487 U.S.\_\_\_\_, 101 L.Ed. 2d 827, 840 (1988). This "disparate impact" analysis was first adopted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under it, the plaintiff can establish a *prima facie* impact case if the evidence establishes that an employer's practice causes a "substantial disparate impact," i.e., that the practice has the effect of disproportionately denying job opportunities on the basis of race. *Id.* Failure to justify a practice in the face of such evidence will subject the employer to liability. *Id.*

1. *Petitioners' Labor Market Analysis Was More Probative Than Respondents' Comparative Statistics, Refuted Any Showing of Disparate Impact, and Should Not Have Been Ignored by the Ninth Circuit.*

The parties offered starkly contrasting statistical evidence on the issue of whether a disparate impact in hiring existed. Respondents argued that the petitioners' actual hiring results in the at-issue jobs should be compared "internally," i.e., compared to the racial composition of the cannery worker jobs.<sup>20</sup> Because this showed a "stratified" work force, i.e., nonwhites were concentrated in the cannery worker jobs, respondents contend impact has been proven.<sup>21</sup>

<sup>20</sup> A variant of this same theme was to make an internal comparison between the petitioners' hiring results for its entire work force (at-issue and not at-issue jobs combined) with the hiring results in the at-issue jobs.

<sup>21</sup> In essence, plaintiffs are arguing either that the cannery workers are the available labor supply or the racial composition of the cannery workers is a reasonable proxy for the available labor supply for the at-issue jobs. The trial court found against them on both points: the cannery workers did not form the labor supply for the at-issue jobs, the company does not promote-from-within in any jobs, and the race of cannery workers is not representative of the relevant labor supply.

Petitioners' countervailing evidence compared their hiring results in the at-issue jobs with the racial composition of an "external" labor market for the jobs at issue. This evidence showed that nonwhites were overrepresented in the cannery worker category and not significantly underrepresented in the at-issue jobs.<sup>22</sup> Although the trial court explicitly found petitioners' statistical evidence more probative, the Ninth Circuit credited respondents' statistics as raising an "inference" of disparate impact. In so doing, the Ninth Circuit also ignored decisions from this Court and the circuit courts that compelled a finding that disparate impact was *not* proven.

In determining whether the evidence established disparate impact, the District Court properly considered the evidence and arguments of *both parties*. The Ninth Circuit did not. This was serious error. *Watson*, *supra*, 101 L.Ed. 2d at 846 (plurality), citing *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977), and *id.* at 338-39 (Rehnquist, J., concurring in result and concurring in part) (must examine plaintiffs' evidence of impact in light of the facts, defendants' attack on that evidence, and defendants' own evidence).<sup>23</sup>

<sup>22</sup> Ex. A-278, Tbl. 4 (each facility) (E.R.2-7). Nonwhites were *over-represented* in the at-issue jobs combined whether considered on a cannery by cannery basis or combination of facilities. See table at J.A. 279; Ex. A-278, Tbl. 4, col. "At Issue" row "CMPS DEV" for each facility (E.R.2-7). It was only when the statistics were disaggregated and analyzed job family by job family on an individual cannery basis that any evidence of underrepresentation of nonwhites surfaced; however, even then, there were only three instances out of a possible 65 at the five class canneries where the underrepresentation was *significant* and in each of those three instances, the underrepresentation was less than three standard deviations. J.A. 280, summarizing J.A. 266-78.

<sup>23</sup> *Accord Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir. 1986); *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 801, n. 8 (5th Cir. 1982).

In analyzing such evidence, this Court cautioned ten years ago that statistics come in an "infinite variety" and their usefulness "depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 and n. 20 (1977).<sup>24</sup> Here, the key factual findings (*supra*, pp. 9-10) plainly undermined whatever probative value respondents' imbalance evidence had and just as plainly supported the petitioners' labor market analysis.

Where the plaintiff, as here, alleges that the employer's recruiting practices and hiring criteria have caused a disproportionate exclusion of a Title VII protected class from certain jobs, identifying the relevant labor market for those jobs and determining its racial composition is "usually the starting point for impact analysis." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983).<sup>25</sup>

<sup>24</sup> Failure to heed this simple, but crucial admonition has often been fatal to a party's statistical case. *E.g.*, *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 191 (5th Cir. 1983) (plaintiffs' applicant flow statistics disapproved because they fail to account for recruiting efforts that resulted in artificially high number of black applicants); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980) (in promotion case, employer's "statistics comparing Uncle Ben's work force to the external labor market are irrelevant"), *vacated and remanded*, 451 U.S. 902 (1981), *aff'd on remand*, 657 F.2d 750 (5th Cir.), *cert. denied*, 459 U.S. 967 (1982).

<sup>25</sup> This "often-decisive... labor pool definition" requires findings as to the source from which the employer normally fills such jobs and the qualifications of potential applicants for such positions. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540 (5th Cir. 1982), citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-312 (1977).

Because petitioners' vacant positions are "filled by lateral hires" from outside their work force, then the "external labor market" is the relevant one. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-545.<sup>26</sup> Using accepted methodology, petitioners' experts determined the proper geographical boundaries of and the racial composition of the persons in that market most likely to possess the qualifications for the jobs at issue.<sup>27</sup> *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308; *Rivera, supra*; *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 658-62 (4th Cir. 1983), *rev'd on other grounds sub nom Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *De Medina v. Reinhardt*, 686 F.2d 997, 1004-1009 (D.C. Cir. 1982); *Clark v. Chrysler Corp.*, 673 F.2d 921, 927-929 (7th Cir. 1982).<sup>28</sup> They then compared petitioners'

<sup>26</sup> On the other hand, the employer's existing work force or "internal labor pool" is most appropriate where the employer fills the jobs at issue from lower level positions by promotion-from-within. *Rivera, supra*, 665 F.2d at 540-41; *Uncle Ben's, supra*, 628 F.2d at 425-426.

Indeed, plaintiffs themselves, in recognition of these facts, offered their own external labor market analysis, but it was rejected by the trial court. Plaintiffs do not challenge that finding here. Although plaintiffs initially alleged there was promotion discrimination, they offered no statistics purporting to show promotion bias.

<sup>27</sup> Petitioners' labor market theory and hiring analysis was explained by their expert labor economist, Dr. Albert Rees, J.A. 250-303; the statistical theory was explained by expert statistician Dr. Donald Wise, R.T. 1688-1726 (see excerpt discussing Ex. A-278 at J.A. 237-246); and the terms in the statistical tables (*e.g.*, Ex. A-278) and other foundational material are explained by Dr. William Price, an expert computer programmer, R.T. 1553-1662 (index of terms set forth at R.T. 1674-77).

<sup>28</sup> This approach is also used to assess the validity of the voluntary adoption of affirmative action plans where such adoption is challenged in "reverse" discrimination cases. See *Johnson v. Transp. Agency*, 480 U.S. \_\_\_, 94 L.Ed. 2d 615, 631 (1987) (citing *Hazelwood* with approval); *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (plan disallowed where minority employees not underrepresented in the jobs at issue in comparison to the area labor market).



actual hiring results in filling vacancies over the relevant time span using the "standard deviation" analysis approved by this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977) (jury selection case), and in the employment discrimination context in *Hazelwood*, *supra*, 433 U.S. at 311, n. 17; *Rivera*, *supra*, 665 F.2d at 536, n. 7. The District Court accepted this evidence.

At least four post-*Hazelwood* circuit court decisions hold that comparative statistics like those offered by plaintiffs will be refuted by credible external labor market evidence that shows no underrepresentation of minorities in the jobs at issue.<sup>29</sup> *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 380 (1st Cir. 1980); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *Federal Reserve Bank of Richmond*, *supra*, 698 F.2d at 658-62 (4th Cir.); *Rivera*, *supra*, 665 F.2d at 539, 544-45 (5th Cir.). See *Clark*, *supra*, 673 F.2d at 929 (7th Cir.) (external labor market data relied on to show no disparate impact in hiring).<sup>30</sup> If nonwhites are not underrepresented in at-issue jobs, it can hardly be said that they have established a *prima facie* case of disparate impact against them in those jobs. See *Johnson v. Transp. Agency*, *supra*, n. 28, 94 L.Ed. 2d at 631, n. 10.

The District Court's determination as to the racial composition of the relevant labor market was undoubtedly factual and reviewable only under the clearly erroneous standard,<sup>31</sup> as was

<sup>29</sup> Moreover, even if plaintiff's objections to Dr. Rees' analysis were accepted and general labor force figures were *not* adjusted for qualifications or availability, seasonal nonwhites are still overrepresented in the at-issue jobs combined and there is no change in the findings as to the few instances of underrepresentation. Ex. A-278, Table 5 (for each cannery or combination of facilities)

<sup>30</sup> Two Ninth Circuit cases rejected contentions of discrimination where plaintiffs relied on comparative statistics without a showing of relative qualifications. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983) (impact); *Pack v. Energy Research & Dev. Admin.*, 566 F.2d 1111 (9th Cir. 1977).

<sup>31</sup> *Markey v. Tenneco Oil Co.*, 707 F.2d 172, 174 (5th Cir. 1983); *Clark v. Chrysler Corp.*, *supra*, 673 F.2d at 928.

its determination of the probative weight of the parties' statistics.<sup>32</sup> *Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1303 (4th Cir. 1984). Like the circuit court in *Hazelwood*, the Ninth Circuit "substituted its judgment for that of District Court" in accepting respondents' proof and ignoring petitioners' evidence that told "a totally different story." *Hazelwood*, *supra*, 433 U.S. at 308-10. This fact finding was error. *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

2. *Allowing Proof of Racial Imbalance to Establish Disparate Impact is Inimical to the Desirable Purposes of Title VII, and Provides an Unreasonable and Unworkable Standard in Practice.*

Most responsible employers attempt to utilize employment practices that provide equal opportunity for women and minorities. Because respondents' theory simplistically assumes that the highest nonwhite percentage in any job category (or in the overall work force) is the standard against which an employer's hiring in *all* categories will be measured, even responsible employers would at least consider covert policies that could *reduce* job opportunities for protected classes *e.g.*, establishing self-imposed *ceilings* on the hiring of women and minorities, both at the hiring stage and through layoffs that bring the work force into "balance."

Respondents' theory discourages affirmative action programs because successful recruitment of a large percentage of minorities in one category will be penalized where it is not achieved in all other categories — even if women and minorities are already proportionately represented in relation to the labor market.

Finally, respondents' theory imposes an unworkable standard on employers. Because the focus is on the racial balance of persons *hired*, rather than on the percentage of persons who

<sup>32</sup> The Ninth Circuit recognized this latter rule on appeal. Pet. App. VI:14, but did not adhere to it.



are available, the employer never knows to what standard he will be held until *after hiring is completed*. Since there is no solace for the employer in achieving the available labor supply percentage (or even matching the racial composition of his applicant flow), the employer never knows in day-to-day practice what the standard will be or how to meet it — unless a self-imposed strict one:one racial hiring ratio is set up — that is, quota hiring. This is directly at odds with the purpose of the statute. *Watson, supra*, 101 L.Ed. 2d at 843-44 (plurality); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment).

The Ninth Circuit's application of respondents' imbalance theory demonstrates the unfairness and the absence of common sense of the theory. These petitioners hired a very large percentage of nonwhites in the cannery worker category principally because they adhered to their obligations under a union contract. The Ninth Circuit then demanded that petitioners justify why that level has not been reached in *all* of their other (at issue) jobs, regardless of the fact that nonwhites are nowhere near that portion of the available labor supply for those jobs.

3. Respondents' "Separate Hiring Channels" Argument is a Red Herring: Where Respondents Have Failed to Show That the Petitioners' Practices for Filling Jobs Not at Issue Either Intentionally or in Effect, Excluded Nonwhites from Jobs At Issue, Those Practices Are Irrelevant.

The principal cause of nonwhite overrepresentation in cannery worker jobs was the dispatching practices of Local 37. (Pet. App. I:110; I:35-37, FF 103, 105-108.) Petitioners did not intentionally hire cannery workers through Local 37 because of the race of the union members or the racial composition of the crews it dispatched. See Pet. App. I:33, FF 93; I:119 (no discriminatory animus). More importantly, respondents failed to establish that hiring cannery workers through Local 37 had the effect of disproportionately excluding nonwhites from the at-issue jobs.<sup>33</sup> There is no evidence showing that nonwhites,

<sup>33</sup> To the contrary, the court found that nonwhites were not significantly under-utilized in those at-issue jobs, that nonwhites were  
(footnote continued on next page)

once they were hired as cannery workers, were "locked in" or were precluded from applying for or being considered for the at-issue jobs. It is the cannery workers themselves who decided to become cannery workers by going to Local 37 in the first place; many other nonwhites initially sought work with the companies, instead of Local 37, and were hired.<sup>34</sup> Thus, not only is the racial composition of the cannery worker crew legally insignificant, the practices used to fill those jobs are irrelevant. See Pet. App. I:105, n. 1 (union nepotism in filling cannery worker jobs has "little, if any, bearing upon at-issue jobs.")

That these petitioners looked to Local 37, a narrow slice of the general labor market, for nonresident cannery workers is reasonable. Local 37 was the exclusive bargaining representative for the jobs and therefore dispatched such workers to the canneries.

The fact that this "source" produced an overrepresentation of nonwhites in the cannery worker jobs does not alter the fact that nonwhites are not underrepresented in the jobs from which they claim exclusion. But for the historical anomaly that this union is run by and dispatches primarily Filipinos, respondents would not even have a case: if the racial composition of the crews Local 37 dispatched had matched the 10% nonwhite labor market, even respondents' "imbalance" theory would fail.<sup>35</sup> Respondents should not be allowed to use this institu-

not "deterred" from applying for at-issue jobs, that whites and non-whites alike were free to apply for at-issue jobs and that similarly situated applicants were treated equally. (Pet. App. I:42, 43, FF 123, 94.)

<sup>34</sup> Ex. A-403, Tbl. 22 (790 nonwhite new seasonal hires in at-issue jobs in petitioners' Alaska facilities combined), Tbl. 23 (433 nonwhite new seasonal hires in at-issue jobs at the five class canneries combined) (E.R. 13, 14).

<sup>35</sup> The effect of Local 37 on nonresident (of Alaska) hiring is graphically demonstrated in Ex. A-499, Tbl. 1 (E.R. 19): Examining hiring of nonresident employees shows that with Local 37 members excluded, whites held 90.2% of the cannery worker and laborer jobs and 91.6% of the at-issue jobs at the five class facilities  
(footnote continued on next page)

tional distortion of the labor market to establish an artificially high standard for nonwhite employment. See *Carroll, supra*, 708 F.2d at 191 (artificially high minority applicant flow not allowed as comparison standard). It is as irrelevant a standard as the race of *students* was in a case involving discrimination against black *teachers*. *Hazelwood, supra*, 433 U.S. at 308.<sup>36</sup>

**B. Respondents Failed to Prove a Practice of "Nepotism" Existed, Their Statistics Purporting to Show Its Existence Were Properly Rejected, and The Ninth Circuit Committed Error in Finding Otherwise.**

The only alleged hiring practice that respondents attempted to offer separate proof of causation or impact was the hiring of relatives. Petitioners concede that relatives *were* hired in some jobs, but deny that respondents ever established that a practice of "nepotism" existed. Nepotism is defined as "favoritism shown to . . . relatives as by giving them positions because of their relationship rather than on their merits." *Webster's Third New International Dictionary of the English Language Unabridged*, p. 518. It has also been defined as the "use of family relationship qualifications for employment . . . opportunities." B. Schlei and P. Grossman, *Employment Discrimination Law* (2d ed. 1983), p. 573.<sup>37</sup>

combined. See also Testimony of Dr. Rees, J.A. 294-299; Ex. A-498, Tbl. 4 (E.R. 17). At Ekuk, which had no Local 37 contract, not a single Filipino was employed as a cannery worker during the case period. R.T. 2892.

<sup>36</sup> A more pertinent application of the impact model to the cannery worker hiring practices would be to compare the labor market for cannery workers (less than 1% Filipino; 10% nonwhite, E.R. 8-9) with the actual percentage hired (20-50%, E.R. 10-14). If the use of this practice has a disparate impact at all, it is on *whites* seeking cannery worker jobs — not on nonwhites seeking at-issue jobs.

<sup>37</sup> See *Gibson v. Local 40*, 543 F.2d 1259, 1268 (9th Cir. 1976) ("preference" given to relatives); *United States v. Ironworkers Local 1*, 438 F.2d 679, 683 (7th Cir.) cert. denied, 404 U.S. 830 (1971) (discovery into "nepotistic practices" allowed because giving "preference to relatives" of union members can violate Title VII).

In the cases where the plaintiff has prevailed in challenging nepotism, the issue was not whether the practice existed, but whether the practice had a disparate impact on the class or was justified. See, e.g., *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982); *Gibson, supra*, n. 37; *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047, 1053-54 (5th Cir. 1969). To prevail, respondents must establish both the existence of nepotism and its impact on the protected class. See *id.*; *EEOC v. Sheet Metal Workers, Local 122*, 463 F. Supp. 388, 422 (D.Md. 1978) (inference of discrimination through nepotism negated by number of blacks entering apprenticeship program under affirmative action plan); *United States v. Jacksonville Terminal Co.*, 316 F. Supp. 567, 592, n. 36 (M.D. Fla. 1970), *aff'd in relevant part, rev'd and remanded on other grounds*, 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972) (no showing policy of nepotism invoked).

Respondents' proof that nepotism existed consisted of evidence that relatives were employees. No policy of preferential treatment was shown to exist and, importantly, respondents failed to establish the crucial element of *causation*: not a single instance (let alone a pattern) of a relative being hired in an at-issue job *because of* that relationship was proven. The District Court considered respondents' evidence, but declined to draw the inference respondents urged. Instead, it was found that there was "no 'preference' for relatives" (Pet. App. I:105); that employees were "chosen because of their qualifications" (*Id.*) after being "evaluated according to job related criteria" (*Id.*, I:122); and "that numerous white persons who 'knew' someone were not hired due to inexperience" (Pet. App. I:122-23).<sup>38</sup> These findings of fact were not clearly erroneous and the Ninth Circuit should not have ignored them

<sup>38</sup> Given these findings, the District Court's reference to the "incidence of nepotism" being "present" (Pet. App. I:103, I:105) must be read as simply references to the existence of the fact that relatives were hired, not to nepotism as a term of art.



in finding that a practice of discriminatory nepotism *did* exist (Pet. App. VI:19-21).<sup>39</sup> *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In addition, the statistics on which respondents relied to establish both that nepotism existed and that it had a disparate impact were severely distorted by gross overcounting due to unproven assumptions and obvious methodological errors.<sup>40</sup> These flaws justified rejection of the statistics. *Teamsters*, *supra*, 431 U.S. at 340, n. 20. The Ninth Circuit simply assumed that respondents' statistics were accurate. Pet. App. VI:21. The 349 "nepotistic hires" referred to is based on the evidence found to be flawed by the District Court. Pet. App. I:105.

<sup>39</sup> The Ninth Circuit's finding is particularly confusing because the court *accepted* the District Court's findings relating to the hiring of relatives (*see* Pet. App. VI:20-21) and the same panel had found in their first opinion that nepotism *did not* exist. *See* 768 F.2d at 1126, 1133 (Pet. App. III:22-23, 56).

<sup>40</sup> Flaws in methodology were pointed out in cross-examination. J.A. 407-413. Among these flaws were: (1) every hire that is counted in the tables assumes that respondents have otherwise established that the person was hired because of the relationship, rather than for some other reason, such as skill. The trial court found otherwise. (2) Respondents' statistics failed "to differentiate those persons who became related through marriage *after* starting work in the canneries." Pet. App. I:105. (3) Respondents counted as *two* nepotistic hires *both* persons who were related at a cannery. J.A. 410. Obviously, one of them had to be hired first and should not be counted at all. This factor alone means that respondents' tables overstate the number of hires by approximately 50%. (4) Respondents continue to count the same employee year after year as being a new "nepotistic hire" so long as he was employed, regardless of when he was first employed or why he was first hired. Illustrative of the flawed methodology is the fact respondents counted three men a total of *seventeen* times in the machinist department at Bumble Bee (of a total of 28). *See* Ex. 603 (E.R. 57-59 "Machinists only") (E. Puffinberger, Juola, Snyder).

Moreover, in deciding that the hiring of relatives (even if proven to be "nepotism") had no disparate impact on minorities, the District Court was entitled to consider the fact that minorities were not underrepresented in the at-issue jobs.<sup>41</sup>

**C. Respondents Failed to Prove Unlawful Discrimination Under the Disparate Impact Theory in Housing, Messing, or So-Called "Racial Labeling."**

Respondents claim that the disparate impact of the housing and messing practices was that class members were racially segregated and deprived of job opportunities. The District Court found that petitioners did not house or feed employees based on race. The "segregation" was not racial—it was based on factors such as job crew and date of arrival. Most employees lived in integrated housing. Whatever imbalance did exist in the bunk houses and mess halls, existed primarily because of the racial composition of the cannery worker crews. As was true of hiring, if Local 37 had not dispatched an overrepresentation of nonwhites, respondents would not have a claim of "segregation" (*i.e.*, imbalance) in housing or messing.

To the extent there were differences in food in different mess halls, it was attributable to personal taste and the ability of the cooks, not race. Separate messing during the season<sup>42</sup>

<sup>41</sup> *See Scott v. Pacific Maritime Ass'n*, 695 F.2d 1199, 1207-08 (9th Cir. 1983); *Presseisen v. Swarthmore College*, 442 F. Supp. 593, 625-26 (E.D. Pa. 1977) ("old boy network" for filling faculty positions not discriminatory in absence of evidence of underutilization of women), *aff'd*, 582 F.2d 1275 (3d Cir. 1978).

<sup>42</sup> All employees at all canneries ate in only one mess hall during the pre-season and the post-season, *i.e.*, before and after the cannery workers arrived. It was only during the season that the second mess hall was opened up at the canneries with a Local 37 cannery worker crew (*i.e.*, other than CWF-Ekuk) when the large influx of cannery workers arrived just before canning started. *E.g.*, J.A.

(footnote continued on next page)



and a different menu for the Local 37 crew was demanded by union leaders, reflected in the union contract, and desired by a large number of the Local 37 cannery workers — requests and demands to which management acceded.

The Ninth Circuit made a finding that the “impact is clear” of housing and messing practices (Pet. App. VI:36) because nonwhites were deprived of job information at the canneries. Pet. App. VI:36-37.<sup>43</sup> However, the evidence showed and the District Court found that job opportunities during the season were “rare”; that whatever openings were filled then were filled from *outside* the cannery work force; and that union contracts providing for payment of guaranteed wages discouraged mid-season transfers because the company might have to pay double guarantees. Moreover, there was not time for mid-season training of inexperienced, unskilled personnel. Thus, job opening information would have had little value to any employee.<sup>44</sup> The complained-of practices had no effect once the season was over, at which time all employees were free to apply for work at the company offices. Pet. App. I:33, FF 94.

Most Local 37 cannery workers did not object to a separate mess hall or to the food served therein, but employees who did

422-24. Even then, if the crew is small enough, the cannery workers will be fed with the other employees in a single mess hall. See, e.g., R.T. 2773, 2803. (Red Salmon 1977: because of limited canning operation, all employees, including cannery workers, fed in a single mess hall); R.T. 2316 (South Naknek 1980). Ekuk, which had no contract with Local 37, had one mess hall. (R.T. 2441.

<sup>43</sup> In so finding, the Ninth Circuit cites not to the evidence, but to another case tried by plaintiffs’ counsel involving a different company and different facts. Pet. App. VI:37.

<sup>44</sup> Plaintiffs also made no showing that whatever little job opening information was available during the season was discussed only in bunkhouses or during meals, as opposed to during working hours, during mugups, or during off-hour recreation periods when job crews intermingled freely.

could change mess halls if they gave notice.<sup>45</sup> Thus, class members could “opt out” of any alleged impact. Cf. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (English-only rule did not discriminate where bilingual plaintiff could avoid it by speaking English on job). To the extent they did not do so, it was either personal preference or “peer pressure.” See e.g., J.A. 620; 463-64, ¶ 14.

Even if there was a *prima facie* case to rebut, petitioners demonstrated the business justification for each of the practices because they “significantly served” the petitioners’ “legitimate business goals” of efficient and economic use of its scarce resources in housing, and accommodating the preferences of a significant number of class members and the demands of their union representatives in messing. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Watson*, *supra*, 101 L. Ed. 2d at 827 (O’Connor, J. plurality); *Contreras v. Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Respondents offered no alternatives. See J.A. 455-46 (discussing practical effect of respondents’ housing contentions).

The District Court also found that race labeling was used by whites and nonwhites alike, but that it was not evidence of intentional discrimination as urged by respondents. Pet. App. I:123. Respondents have offered no evidence that race labeling, whether done by whites or by class members, had a significant disparate effect on nonwhite job opportunities. If such labels were overheard by or used by class members, respondents have made no showing that this excluded them from job opportunities. To the extent respondents claim it resulted in “deterrence” of nonwhite applicants, the District Court found otherwise. Pet. App. I:123. It did not result in a significant underrepresentation of nonwhite employees in the at-issue jobs.

<sup>45</sup> See R.T. 2393, ¶ 1-2; 2394-95, ¶¶ 6-10; and 2413, lns. 15-20 (see excerpts in J.A. 432-33); R.T. 2542, ¶ 11 (J.A. 435-36); R.T. 2708, ¶ 11; R.T. 2713, lns. 1-30; R.T. 3190, ¶¶ 7, 9 (J.A. 587-88); Dep. of Leonardo (4/5/78), p. 37, lns. 10-14.

**II. Allowing Respondents to Challenge the Cumulative Effect Of An Entire Range of Non-Racially Motivated Employment Practices Based Merely On A Showing The Petitioners' Work Force Reflects An Uneven Racial Balance Is An Improper Application Of The Disparate Impact Model, Unfairly Allocates The Burdens of Proof And Encourages Conduct At Odds With The Purposes of Title VII.**

**A. Respondents Are Required to Prove the Causal Effect of Each Practice They Choose to Challenge Under the Impact Model.**

The impact model was not designed for this type of shotgun, undifferentiated attack on a large number of diverse employment practices. In *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982), the court held that the disparate impact model is not "the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of a company's employment practices."<sup>46</sup> Accord *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 189 (5th Cir. 1983); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014, 1016 (1st Cir. 1984); *A.F.S.C.M.E. v. State of Wash.*, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (Kennedy, J.) (impact analysis limited to challenge of "a specific, clearly delineated employment practice applied at a single point in the selection process"; "decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves an assessment too multifaceted to be appropriate for the disparate impact analysis."). The Court of Appeals unpersuasively sought to distinguish a similar case (*Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984)), because respondents here had "identified" the practices. Pet. App. V:38, n. 6.

<sup>46</sup> In its first panel opinion, the Ninth Circuit described plaintiffs' case here: "By and large, however, [plaintiffs] have not challenged a specific facially neutral practice. Rather [plaintiffs] have mounted a broad-scale attack against the gamut of defendants' subjective employment practices." Pet. App. III:48.

In *Pouncy*, as here, the employer had "an uneven racial balance" in the work force in which nonwhites were "over-represented in the lower levels." 668 F.2d at 800, 801. The plaintiff "singled out" three employment practices as being discriminatory, but because he relied only on cumulative hiring results, he could not show "that independent of other factors, the employment practices he challenge[d] . . . caused the racial imbalance in Prudential's work force." *Id.* at 801. Petitioners submit that the *Pouncy* view is correct, particularly when applied to the facts of this case.

Respondents here chose 16 different practices that they assert had a discriminatory effect in job allocation. See n. 14, *supra*. With but one exception,<sup>47</sup> they point to the same and only set of cumulative comparative statistics as evidence of the disparate impact of each and all of these practices. But by so doing, respondents necessarily must concede that they cannot prove causation by any one of the challenged practices. Without proof of causation, however, respondents' impact claims must fail at the threshold. *Pouncy, supra*, 668 F.2d at 800-802; *Robinson, supra*; *Carroll, supra*, 708 F.2d at 189.

This causation requirement is implicit in the decisions of this Court: in each of the successful impact cases, the plaintiffs established the discriminatory effect *separately* for each practice. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma and aptitude test); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height/weight requirements); *Connecticut v. Teal*, 457 U.S. 440 (1982) (test). This past Term, Justice O'Connor, speaking for a plurality of the Court, recognized this fundamental threshold burden on plaintiff:

[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are

<sup>47</sup> Nepotism — see discussion, *supra*, pp. 24-26.



allegedly responsible for any observed statistical disparities. Cf. *Connecticut v. Teal*, 457 U.S. 440 (1982).

Once the employment practice at issue has been identified, causation must be proved; that is, the *plaintiff* must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protested group. (Emphasis added.)

*Watson, supra*, 101 L. Ed. 2d at 845.

Respondents urge a "collective" approach because their proof as to the existence or effect of individual practices failed. For instance, respondents complain that the petitioners fill at-issue jobs by "word-of-mouth recruiting."<sup>48</sup> The implicit assumption is that this practice must result in disproportionate numbers of whites being hired. That assumption can be tested by comparing the racial results of employers' hiring with the racial composition of the relevant labor market. E.g., *Clark, supra*, 673 F.2d at 927-929.<sup>49</sup> Here, that very comparison showed nonwhites were not significantly under-represented in the jobs at issue. Pet. App. I:42-43, FF 123; Ex. A-278, Tbl. 4 (for each cannery or combination of canneries) (E.R. 2-7).

With respect to the practice of hiring nonresident cannery workers through Local 37, as discussed, *supra*, pp. 22-23, there was no evidence that this practice disproportionately excluded nonwhites from the at-issue jobs.

Some of the practices "named" as causing racial disparities in hiring did not even exist, were unproven or were

<sup>48</sup> Word-of-mouth recruiting was only one of several methods of finding employees. Petitioners proved and the District Court found that petitioners accepted walk-in applicants and also looked to unions with appropriate jurisdiction as a source of employees.

<sup>49</sup> Plaintiffs attempted to so prove impact with their own labor market theory. It postulated nonwhites were 50% of the available labor supply and assumed that nearly all of the at-issue jobs required no skills, but it was rejected.

irrelevant. The trial court found the petitioners did not discriminate in terminations (individually or by ceasing to recruit in remote villages), did not discriminate in pay in any jobs, did not grant preference to relatives ("nepotism"), did not discriminate in fraternization restrictions or in assigning "menial tasks," and, however "informal" the petitioners' promotion procedures were, it did not matter because petitioners did not promote from within anyway.<sup>50</sup>

Finally, respondents' case failed on several practices because they were found to meet the "job relatedness" or "business necessity" test.<sup>51</sup> See *infra*, p. 34.

Since respondents were unable to establish their case as to any practice separately, their burden should not be lessened on the mere allegation that the practices "collectively" caused an impact, particularly where that "impact" is nothing more than lack of racial balance.

<sup>50</sup> The remaining challenged practices, e.g., "labeling," were, again, not separately analyzed by plaintiffs for their effect on hiring. Presumably, their claim was that these practices had the effect of "detering" or "chilling" nonwhites from applying. However, the District Court found that there was no deterrence. Pet. App. I:123.

<sup>51</sup> E.g., English language requirement; rehire preference.



***B. Dispensing With the Causation Requirement for Plaintiffs Places an Unfair Burden on Employers, and Encourages Conduct at Odds With Title VII's Purpose.***

If the plaintiff fails (or refuses) to show the causal connection between any practice and any showing of disparate impact, the employer does not know *which* practice (or all) he must justify under the "business necessity" or "job-relatedness" defense.<sup>52</sup> This is unfair in and of itself, but as applied by the Ninth Circuit, the employer must justify *all* of the practices named by the plaintiff.

Here, the District Court found that employees in the at-issue jobs were "hired according to job-related criteria," and that the English language requirement, the rehire preference, housing practices, and messing practices were all business necessities. That is, the District Court found that the petitioners met their burden on at least five of the 16 practices named — and the Ninth Circuit affirmed on at least two (language requirement and rehire preference). (And, as discussed above, several others were shown not to exist.) If the plaintiffs insist that all of the practices "combined" to cause the impact but failed to show the causal connection for any one, then proof of business necessity of one of those practices should satisfy the employer's burden, absent evidence by plaintiffs that the remaining practices had a significant effect. Such proof on five of those practices is present here. To require an employer to prove the necessity of all practices would simply encourage a plaintiff to name as many "practices" as he could in the reasonable expectation that the employer could show the business necessity of less than all. *Pouncy, supra*, 668 F.2d at 801.

<sup>52</sup> Nor would the *trial court* know which practice(s) to "change" at the injunctive relief stage if the employer fails in his burden.

Under respondents' theory, the burden of justification could still be shifted to the employer if there is a disparity, but it is caused by a practice *not* identified by plaintiff. For instance, here the employers filled at-issue jobs from walk-in applicants and by referrals from other unions, as well, but respondents did not challenge these practices, nor did they attempt to prove their relative significance.

It might be argued that the employer *should* be required to prove causation where the plaintiff is unable to do so. *E.g., Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985). First, this completely reverses the causation requirement explicitly stated in *Watson, supra*, 101 L. Ed. 2d at 845 (O'Connor, J., plurality), and implicit in this Court's other impact opinions. Second, it is grounded on the belief that plaintiffs might not be able to obtain evidence of causation of the practices they challenge through normal civil discovery. If these processes are sufficient to allow plaintiffs the means to prove discriminatory *motive*,<sup>53</sup> they should also suffice to prove discriminatory impact.<sup>54</sup>

Third, the practical effect of reversing this burden of proof is both staggering and ominous. While the employer would know the reasons he has used certain practices, it is entirely unlikely that he does or could keep track of the *statistical effect* of each possible practice that *might* be litigated on *each* protected class and subclass that might raise a Title VII claim against the business. Obviously, this would be a mammoth effort because:

[It is] unrealistic to suppose that employers can eliminate, or discovery and explain, the myriad of innocent causes

<sup>53</sup> *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

<sup>54</sup> Indeed, numerous plaintiffs have succeeded in establishing both impact and causation where they attack more than one practice. *E.g., Griggs, supra*, 401 U.S. 424 (diploma requirement and test); *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985) (written exam, education requirement, physical agility test), *cert. denied*, 475 U.S. 1109 (1986).

that may lead to statistical imbalances in the composition of their work forces.

*Watson, supra*, 101 L. Ed. 2d at 843 (O'Connor, J. plurality).

Many would find it more practical, particularly if plaintiff is allowed to proceed with a base showing of racial imbalance, simply to adopt an in-house policy of maintaining strict racial and gender balance in all job categories, *i.e.*, quota hiring and layoffs, a specter this court warned about only last Term in *Watson, supra*, 101 L. Ed. 2d at 843-44 (Section II-C) (plurality), 856 (Stevens, J. concurring in the judgment, citing Section II-C of plurality opinion favorably).

However, even if the petitioners in this case had such a burden, they have met it. The proof of disparate impact credited by the Ninth Circuit was respondents' showing of imbalance. As to one "side" of the scales: the trial court found that the principal cause of the overrepresentation of nonwhites in the cannery worker jobs was the dispatching practices of Local 37, ILWU. As to the other side: the relatively low percentage of nonwhites in the at-issue jobs is attributable to hiring laterally from the relevant labor market that happens to be approximately 10% nonwhite and to the "rehire" practice, *i.e.*, rehiring persons returning in the same job that they held the preceding season.<sup>55</sup> Plainly, all of these "practices" were justified and respondents offered no practical alternatives.<sup>56</sup>

<sup>55</sup> See Pet. App. I:33, FF 95; Ex. A-320(a), pp. 3-5: 85% of all at issue jobs are filled by either rehires (40%) or new hires from outside petitioners' workforce (45%).

<sup>56</sup> When one examines the "alternatives" to eliminate the imbalance of which plaintiffs complain, the fallacy of plaintiffs' "hiring channels" argument becomes readily apparent: an obvious, cost-effective way is to stop hiring from Local 37 and begin hiring all cannery workers from the 10% nonwhite general labor market.

### III. The Ninth Circuit Improperly Shifted The Burden Of Proof To Petitioners.

On remand from the *en banc* court, the Ninth Circuit panel proceeded to fashion a new allocation of the burdens of proof in an impact case, drastically lowering respondents' and raising petitioners'.

#### A. Respondents Did Not Meet the Initial Requirements to Establish An Impact Case.

As in any civil lawsuit, the plaintiff must bear the ultimate burden of persuasion; this is equally applicable to the impact or treatment models. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, n. 31 (1979) (impact); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (treatment); Fed. R. Evid. 301. Accord *Watson, supra*, 101 L. Ed. 2d at 847 (plurality).

Before any burden can be shifted to the employer, the plaintiff must establish a *prima facie* impact claim. These elements include (1) a significant statistical disparity (2) caused by an employment practice. *E.g.*, *Watson, supra*, 101 L. Ed. 2d at 851 (Blackmun, J. concurring in judgment). In fact, the Ninth Circuit recognized that the respondents' burden in the impact case is more onerous than in a treatment case. Pet. App. V:37.<sup>57</sup> The Ninth Circuit paid lip service to these requirements but did not apply them. Pet. App. V:37; VI-3, 19.

The Ninth Circuit said that respondents' comparative statistics, showing only racial stratification by job category, were "sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by plaintiffs." Pet. App. V:18 (emphasis supplied).

<sup>57</sup> "The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and establish the causal connection." The Ninth and Fifth Circuits have held that  
(footnote continued on next page)



As noted above,<sup>58</sup> respondents' comparative statistics, coupled with a litany of practices, is not adequate to establish disparate impact under the decisions of this Court. The ultimate question is whether petitioners *did* engage in racial discrimination. Respondents' mere proof of *prima facie* treatment case (described as "marginal" by the District Court for the skilled jobs) establishes only an *inference* of discrimination. See *infra*, pp.41-42. The Ninth Circuit erroneously concluded this showing sufficed to prove impact. Pet. App. VI:4-5 (proof of *prima facie* case identical under both theories). Under the impact model, the plaintiff must establish more than mere inference, he must establish that the practice has an improper effect. *Watson v. Fort Worth Bank & Trust*, 487 U.S.\_\_\_\_, 101 L. Ed. 2d 827, 851 (1988) (Blackmun, J., concurring in judgment).

**B. The Ninth Circuit's Decision Conflicts With the Order of Proof Requirements of *Burdine*.**

The Ninth Circuit holds that petitioners' treatment case "explanation" supplies the missing elements of respondents' case on causation, and also makes unnecessary the consideration of petitioners' labor market evidence and attack on respondents' statistics. It recognizes that under the order of proof for a treatment case the employer is only required to meet respondents' *prima facie* case with the articulation of a nondiscriminatory reason for the selection process. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Pet. App. III:16. The court also recognizes that

for a disparate impact, plaintiff must not merely prove circumstances raising an inference but must prove the discriminatory impact at issue. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

<sup>58</sup> Section I.A.; II.

petitioners do not have to accept respondents' statistics and may introduce statistics of their own. Pet. App. VI:5. However, the court states that if the employer defends by explaining the reason for the disparity, articulation is insufficient; the employer must then prove the business necessity of the named practices. Pet. App. VI:5.

Petitioners did articulate, and prove to the trial court's satisfaction, a number of nondiscriminatory reasons for the disparity: institutional factors caused stratification, the employers did not promote from within, transferring personnel between departments during the season required payment of two guarantees, there was insufficient time to train inexperienced help for most jobs, skills of a cannery worker are not a substitute for the skill and experience requirements of the skilled non-cannery jobs, and that the relevant labor market is 90% white.

The Court of Appeals states — incorrectly — that petitioners "conceded" causation. Pet. App. VI:24. This apparently is that court's view of the explanation offered by petitioners to meet the treatment claims. The Court of Appeals erroneously cites *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), in support of the proposition that *explanation* of the imbalance shifts the burden to the employer to show business necessity. Pet. App. VI:5. *Albemarle* holds that once the impact of a practice is established, the employer has such a burden.

A similar citation to *Albemarle* may be found in *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom Meese v. Segar*, 471 U.S. 1115 (1985). In *Segar*, plaintiffs advanced a treatment case. The Court of Appeals there speculated that the degree of proof required of an employer in defending a class action case — as opposed to one of individual discrimination such as *Burdine* — might require more than just articulation of a reason to succeed. In this process the court states, an employer "will in all likelihood" point to a



specific job qualification as an explanation for the disparity. 738 F.2d 1249, 1271. The statement is *dicta* since the court affirmed a finding of disparate treatment and went on to say that if the employer had advanced the requirement of an additional year's experience as the reason for the disparity that discrete requirement "would have been" subject to an impact analysis. 738 F.2d 1249, 1288. A similar statement appears in *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985), where the court stated that if on remand the plaintiff succeeded in establishing a treatment case, and if the employer defended by reliance on a supervisory register and a test, the employer had to validate those procedures. Simply stated, *Segar* and *Griffin* merely hold that if an employer defends a treatment case by explaining that the disparity is caused by a test, he may have to defend the test.

No circuit court appears to have actually applied this requirement nor have any circuits followed *Segar* or *Griffin* on this point.<sup>59</sup>

The concept advanced by the Ninth Circuit here is much broader than *Segar* or *Griffin* and is directly at odds with the holding of *Burdine*. There, the Fifth Circuit required the employer to prove — not merely articulate — a nondiscriminatory reason for the employer's conduct. 450 U.S. at 252. This Court held that to be error, that the employer need only come forward with evidence sufficient to allow an inference of nondiscriminatory conduct. The policy reasons stated are sound: it is plaintiffs' case; defendants' explanation must be clear enough to allow an attack on pretext grounds; the employer has the incentive to persuade; and liberal discovery rules are supplemented by the EEOC investigatory files.

<sup>59</sup> The Third Circuit in *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), *pet. for writ of cert. filed* (No. 88-141), has approved the use of a multiple practice impact analysis in reliance on *Segar* and *Griffin*.

**C. Respondents' Evidence Was Not Adequate Under Either Impact or Treatment Order of Proof Requirements.**

In *Burdine*, this Court described the establishment of a *prima facie* case as evidence which — if believed — and if the employer is silent — requires the entry of judgment for plaintiff. 450 U.S. 248, 254. This *prima facie* case is used in the sense of a rebuttable presumption; but the rebuttal is made by offering evidence which need not persuade the court of nondiscrimination but merely raises an inference of such conduct. *Id.* at 254.<sup>60</sup> This form of presumption of discrimination, though fragile, was the one adopted in Fed. R. Evid. 301.<sup>61</sup>

<sup>60</sup> This Court recognized that a *prima facie* case in common law may either refer to the level of evidence sufficient to allow a case to go to a jury, or a legally mandatory rebuttable presumption. The court used the term in the latter sense. The presumption disappears as such when countervailing evidence is produced — even though the countervailing evidence is not believed. At that point in the case, the trier of fact may still consider both sides of the evidence. 450 U.S. 254, citing 9 Wigmore, Evidence, § 2491 (3d ed. 1940) and Fed. R. Evid. 301. In adopting Rule 301, this Court accepted the Thayer or "bursting bubble" view of presumptions rather than the Morgan view, which would give greater effect to a presumption than the mere burden of putting in evidence which may be disbelieved by the trier of fact. Wigmore, § 2493C (1981).

<sup>61</sup> Rule 301. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion which remains throughout the trial upon the party on whom it was originally cast.

The use of the term *prima facie* case in the impact case may be analyzed on the same basis. If the plaintiff comes forward with statistics and other evidence showing that a specific practice has disproportionately excluded a protected group, he has made a *prima facie* case which will entitle him to entry of judgment if the employer remains silent. If the employer comes forward with his own statistics showing (but not necessarily proving) no disproportionate exclusion or that the practice complained of may not have caused the disparity, or if on cross-examination he shows flaws in plaintiffs' statistics, or impeaches or discredits plaintiffs' witnesses, he has met his burden of production and the trier of fact may believe either side's witnesses. Under a strict reading of *Griggs*, if the employer remains silent on the issue of disparate impact, that issue is established and he then must come forward with what amounts to an affirmative defense of business necessity. See *Wigmore*, § 2487 (1981).<sup>62</sup> Such a strict reading has recently been questioned by a plurality of this Court. *Watson*, *supra*, 101 L. Ed. 2d at 847.

Here, however, petitioners did not stand silent before respondents' evidence. That evidence was vigorously attacked as to reliability and credibility.<sup>63</sup> The respondents' labor market, nepotism tables, and comparative statistics were all shown to be flawed. Their contentions of fraternization restrictions were flatly disproved by evidence of fraternization. Their claims of individual discrimination were demonstrated to be without merit because of lack of application, untimely application, lack of qualification, or the jobs were full at the

<sup>62</sup> Citing *Speasu v. Merchants Bank & Trust Co.*, 188 N.C. 524, 529, 125 S.E. 398, 401 (1924), "The burden of proof continues to rest upon the party who, either as plaintiff or as defendant affirmatively alleges facts necessary to enable him to prevail in the cause."

<sup>63</sup> The Court committed plain error in concluding that petitioners *did not argue* the practices had "no impact." Pet. App. VI:30. This error was pointed out in the Petition for Rehearing. Pet. App. VII.

time. Defendants' labor market and other evidence showed that no disparity existed and that persons were hired according to job-related criteria. Thus, regardless of the analytical theory under which respondents advanced their case, there was not an un rebutted presumption of discrimination.

***D. It Was Not Petitioners' Burden to Show Lack of Qualifications of the Respondents Nor Should Petitioners Be Required to Target Labor Sources Chosen by the Court of Appeals to Maximize Minority Hiring.***

The Ninth Circuit's application of the impact theory to hiring criteria and labor sources is erroneous and should be rejected.

The panel recognized that a plaintiff normally is required to show statistics which reflect the percentage of qualified nonwhites who were available for the at-issue jobs when challenging hiring in skilled jobs. Pet. App. III:35. However, when the panel proceeded to analyze the same issue and evidence under the impact analysis, it stated that since respondents had placed the job qualifications in issue, the burden shifted to the employer to show lack of qualifications, citing *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1358, n. 1 (9th Cir. 1975); and *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982).<sup>64</sup> Pet. App. VI:17, 26. The *Kaplan* case did not involve a dispute as to

<sup>64</sup> The Ninth Circuit also supports its conclusion by mischaracterizing petitioners' argument. Petitioners do not argue there are "no qualified nonwhites for the at-issue jobs." Pet. App. VI:25. Petitioners hired hundreds of minority workers for those very jobs. See *supra*, n. 34. Petitioners argued (and the District Court found) that the relevant external labor supply is only about 10% nonwhite and that fact shows there are relatively few nonwhites available in comparison to whites, i.e., 10% vs. 90%, as opposed to equal 50%/50% availability argued by respondents.



qualifications. *Wang* did not involve the qualifications of a statistical pool.<sup>65</sup>

This alteration of the burdens of proof is inconsistent with decisions of this Court that stand for the proposition that if a plaintiff wishes to challenge a hiring criterion as having a disparate impact, he must prove *that criterion* causes the impact. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), plaintiffs established the disparate impact of a high school diploma requirement with un rebutted evidence that a disproportionately smaller percentage of blacks had diplomas. 401 U.S. at 430, n. 6. In *Dothard v. Rawlinson*, *supra*, plaintiffs established the disparate impact of a height and weight requirement by showing that a disproportionate number of women were less than 5'2" tall and weighed under 120 pounds. 433 U.S. at 429-30. In neither case would the plaintiffs have been allowed to establish an impact case by simply *alleging* the practice was discriminatory without independent evidence that the qualification *had* an impact. *Watson*, *supra*, 101 L.Ed.2d at 845.

Yet, this is precisely what the Ninth Circuit has done here. It held that since respondents *claimed* the criteria are discriminatory, they are *not* required to take those criteria into account to prove impact. Pet. App. VI:17, 27. Respondents chose not to do so (relying instead on their argument that the at-issue jobs were not skilled and did not require experience), but they did so at their peril. The trial court found that petitioners *did* hire on the basis of job-related criteria.

Other Ninth Circuit cases do require plaintiffs to use statistics from a qualified pool and reject comparative statistics where the jobs are not fungible. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 479 (9th Cir. 1983); *Pack v. Energy Research & Dev. Admin.*, 566 F.2d 1111, 1113 (9th Cir. 1977).

<sup>65</sup> *Wang* does, however, stand for the erroneous proposition that a plaintiff does not have to prove his qualification for promotion.

Other circuits are in accord. *Ste. Marie v. Eastern R. Assoc.*, 650 F.2d 395, 400-401 (2d Cir. 1981); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *EEOC v. Fed. Reserve Bank of Richmond*, *supra*, 698 F.2d at 658-660.

It is not surprising that respondents chose not to account for even the most basic qualifications of the "proxy" population of potential employees. *Petitioners* did so with their labor market analysis and it established that qualified nonwhite availability was closer to 10% than to the 50% argued by respondents. See J.A. 255-56, ¶ 7; 258-60, ¶¶ 12-13. The Ninth Circuit demanded that petitioners prove the qualified nonwhite component in the labor market (Pet. App. VI:17, 26), but ignored the evidence doing just that. This evidence accounted for the fact that the different "job families" at the canneries required different skills and experience (e.g., machinists vs. cooks vs. carpenters). As adjusted, the nonwhite availability percentages range from about 2% (administration) to 20% (culinary), depending on the job family, and "centered" on 10% for the at-issue jobs combined. Exhibit A-278, labor pool tables, Tbls. 4(a)-4(b), row "Nonwhite" for each job family column (E.R. 8-9). These adjusted availability figures were compared to actual hiring in the job families at issue: nonwhites were not significantly underrepresented. See J.A. 266-280. Use of the unadjusted availability figures does not change the conclusion. See *supra*, n.29.

The panel also placed the burden on petitioners to prove why they *did not* hire from different sources for at-issue jobs, e.g., promote from within, target Local 37 as a source of machinists, or scour the remote areas of Alaska for persons to fill at-issue jobs.<sup>66</sup> Pet. App. VI:30. In doing so, the Ninth Circuit is plainly substituting its judgment for management as to the best way to operate the business. The Ninth Circuit is merely attempting to require petitioners to maximize the

<sup>66</sup> A practice the District Court found unreasonable. Pet. App. I:32, FF 90.



number of minority workers hired. This is a flat violation of the admonitions of this Court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978); *Burdine*, *supra*, 450 U.S. at 259; and *Watson*, *supra*, 101 L. Ed. at 848.

Moreover, since nonwhites are not underrepresented, the Ninth Circuit's demand is inconsistent with this Court's opinion in *Johnson v. Transp. Agency*, 480 U.S.\_\_\_\_, 94 L.Ed. 2d 615 (1987) (inappropriate to adopt voluntary affirmative action plan to boost minority hiring in jobs where there is no underrepresentation of minority workers).

#### E. Clarification of the Order of Proof.

It is apparent that the Ninth Circuit misunderstood the proper allocation of proof and sailed into uncharted seas. When this Court defined the order of proof in *Burdine*, it was clarifying the discrete order of proof to raise a *prima facie* case under *McDonnell Douglas*. The Court should offer guidelines with respect to the order of proof in impact cases. Petitioners submit this can be accomplished within the principles announced by both the plurality and concurring opinions in *Watson*.

A plaintiff may offer various forms of evidence in his case in chief to show discrimination. In the impact case, he will offer statistics and evidence of causation, and he may proceed simultaneously on a treatment theory and offer *McDonnell Douglas* evidence and anecdotes. The employer, then, has an opportunity to come forward. The employer should be able to meet his burden of production with evidence showing that no inference of discrimination should be drawn. If plaintiff relies on a mere imbalance in job classifications as his impact case, the employer should be able to show — as in this case — that he chooses to hire his noncannery workers from lateral sources. He may also show that there are practical, non-discriminatory reasons for not promoting or transferring from

within. The employer thus meets the inferences put forward by plaintiff with inferences showing lack of discrimination. He may also offer evidence of the business necessity of a discrete practice. The plaintiff can still attempt to show pretext. When all the evidence is before the trial court, it is weighed and the facts are found.

Prior to *Watson*, as the plurality noted, the impact analysis had not been extended into the context of subjective selection practices. Traditionally, that analysis had been applied to rigid objective criteria which automatically disqualified a portion of the protected group, *Dothard v. Rawlinson*, *supra*, 433 U.S. at 338 (Rehnquist, J. concurring), or as Judge Sneed stated in the *en banc* proceeding, criteria which make the "plaintiff's true qualifications irrelevant." Pet. App. V:59. Such criteria are arguably subject to standardized testing and necessity, job relatedness and manifest relationship may be determined.

However, the exercise of sound business judgment is far less subject to testing or validation. Discretion by its very nature is never rigid. Those who survive in business are probably far better able to predict success than psychologists, economists, professors, and courts. Since it is his business at risk, an employer must be allowed the freedom to make legitimate choices. The *Watson* plurality observed that the employer may find it easier in the context of subjective decision making to produce evidence of a manifest relationship. 101 L. Ed. 2d at 848. Indeed, the rigid formula of *Griggs* itself should be re-examined in this context. In many cases the formula will be difficult to apply, particularly if the plaintiff's case is marginal or is a shotgun attack on all practices. In that situation, a showing of a legitimate business reason — rather than necessity — should be adequate. At that point, the plaintiff's case is still in the inference stage and any countervailing evidence should be adequate rebuttal of the inference.

## CONCLUSION

This case has been pending for nearly 15 years. It should end here. Respondents' evidence was carefully considered by the trial court and found insufficient to prove class-wide or individual disparate treatment. That evidence is no stronger under the impact analysis. The Ninth Circuit resurrected respondents' case by inappropriately applying the impact analysis. In so doing, it ignored binding legal precedent, erroneously reallocated the burdens of proof, and filled respondents' evidentiary gaps with its own fact-finding. The end result is an unwise decision that drastically reduces the quality and quantity of evidence expected of plaintiffs and imposes unfair and unrealistic burdens on employers. As such, it represents a major intrusion into the operation of American businesses that all but compels employers to take actions at odds with the salutary purposes of Title VII of the Civil Rights Act of 1964. The decision should be reversed with directions to enter judgment for petitioners on all claims

Respectfully submitted,

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ,  
WELLS & FRYER

*Attorneys for Petitioners*

\* Counsel of Record

14  
No. 87-1387

Supreme Court, U.S.

FILED

NOV 5 1988

ROBERT F. SPANGLER, JR.  
CLERK

**IN THE  
Supreme Court of the United States**

**October Term, 1988**

**WARDS COVE PACKING COMPANY, INC.  
CASTLE & COOKE, INC.,**

*Petitioners,*

**v.**

**FRANK ATONIO, et al.,**

*Respondents.*

**BRIEF OF RESPONDENTS**

Abraham A. Arditi  
Northwest Labor and  
Employment Law Office  
900 Hoge Building  
Seattle, Washington 98104  
1-206-623-1590

*Counsel of Record  
for Respondents*

Bobbe Jean Bridge  
Garvey, Schubert & Barer  
Waterfront Place Building  
Seattle, WA 98104  
1-206-464-3939

*Counsel for Respondents*

69 P5



## INDEX

	Page
Statement of the Case.....	1
1. Introduction.....	1
2. Racial Stratification In Jobs.....	3
A. Job Departments .....	3
B. The Statistics .....	4
3. Race Labelling of Jobs .....	6
4. Segregated Hiring Channels.....	7
5. Nepotism In Upper-Level Jobs .....	10
6. Lack of Objective or Discernible Qualifications .....	11
7. Re-Hiring Past Employees In Their Old Departments .....	14
8. Individual Instances of Discrimination.....	15
9. The Labor Supply .....	15
10. Housing Segregation .....	19
11. Messing Segregation .....	20
Summary of Argument .....	21
Argument .....	23
1. Statistics on Job Segregation Or Practices Which Foster It Establish Disparate Impact Regardless of What Labor Market Comparisons Show.....	23
A. The Language of Title VII Makes Job Segregation and Practices Which Promote It Illegal .....	23
B. Even the Labor Market Statistics WCP and BBS Offered Establish a Prima Facie Case for Many Jobs .....	25
C. Labor Market Comparisons Cannot Rebut or Justify Statistical Showings of Job Segregation .....	26
D. The Labor Supply Findings Were Induced by Errors of Law .....	30
E. Alleged Skill Requirements Do Not Detract From Work Force Statistics Here .....	32

2. The Employees Did Not Have to Offer Statistics On Qualified Non-Whites, Since the Employers Never Identified Criteria Actually Applied, They Lacked Objective Qualifications and the Qualifications They Did Use Had a Disparate Impact .....	32
3. Housing and Messing Segregation and Race- Labelling Have a Disparate Impact on Non- Whites .....	35
4. Nepotism Has a Disparate Impact on Non- Whites Here .....	37
5. The Employees Established Causation .....	38
6. WCP and BBS Have Not Met Their Heavy Burden of Proving Business Necessity.....	43
7. The Court Should Also Affirm on Alternate Grounds of Disparate Treatment .....	49
Conclusion .....	50
Appendices:	
Appendix A.....	A-1
Appendix B.....	B-1
Appendix C.....	C-1
Appendix D .....	D-1

## TABLE OF AUTHORITIES

## Cases

<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	24, 29, 33, 43, 46, <i>passim</i>
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983) .....	30, 36
<i>Atonio v. Wards Cove Packing Co.</i> , 703 F.2d 329 (9th Cir. 1983) .....	1
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986).....	28, 36, 40, 49
<i>Bigelow v. RKO Pictures, Inc.</i> , 327 U.S. 251 (1946).....	43
<i>Burrus v. United Telephone Company of Kansas, Inc.</i> , 683 F.2d 339 (10th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1071 (1982) .....	34
<i>Bushey v. New York State Civil Service Commission</i> , 733 F.2d 220 (2nd Cir. 1984), <i>cert. denied</i> , 469 U.S. 1117 (1985) .....	35
<i>California Brewers Ass'n v. Bryant</i> , 444 U.S. 598 (1980)...	48
<i>Capaci v. Katz and Besthoff, Inc.</i> , 711 F.2d 647 (5th Cir. 1983), <i>cert. denied</i> , 466 U.S. 927 (1984) .....	38
<i>Carpenter v. Nefco-Fidalgo Packing Co.</i> , No. C74-407R (W.D. Wash. May 20, 1982) .....	2, 29, 33
<i>Carpenter v. Steven F. Austin State University</i> , 706 F.2d 608 (5th Cir. 1983).....	25, 27
<i>Castro v. Beecher</i> , 459 F.2d 725 (1st Cir. 1972).....	44
<i>Caviale v. State of Wisconsin</i> , 744 F.2d 1289 (7th Cir. 1984) .....	34
<i>Chance v. Board of Examiners</i> , 458 F.2d 1167 (2nd Cir. 1972) .....	44, 45
<i>Chandler v. Roudebush</i> , 425 U.S. 840 (1976) .....	24
<i>Chrisler v. Complete Auto Transit, Inc.</i> , 645 F.2d 1251 (6th Cir. 1981).....	33
<i>Colby v. J.C. Penney Co.</i> , 811 F.2d 1119 (7th Cir. 1987) .....	36

<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	21, 22, 23, 27, 28, <i>passim</i>
<i>Consumer Product Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980) .....	24
<i>Croker v. Boeing Co. (Vertol Div.)</i> , 662 F.2d 975 (3rd Cir. 1981) .....	44
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974) .....	22, 36
<i>Davis v. Califano</i> , 613 F.2d 957 (D.C. Cir. 1979) .....	34
<i>De Medina v. Reinhart</i> , 686 F.2d 997 (D.C. Cir. 1982) ....	34
<i>Domingo v. New England Fish Co.</i> , 445 F. Supp 421 (W.D. Wash. 1977), <i>reversed on other issues</i> , 727 F.2d 1429 (9th Cir. 1984), <i>modified</i> , 742 F.2d 520 .....	29, 30, 31, 33, 36, <i>passim</i>
<i>Domingo v. New England Fish Co.</i> , 727 F.2d 1429 (9th Cir. 1984), <i>modified</i> , 742 F.2d 520 (1984) .....	24-25, 29, 33, 34, <i>passim</i>
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	25, 27, 30, 35, <i>passim</i>
<i>EEOC v. J.C. Penney Co.</i> , 843 F.2d 249 (6th Cir. 1988) .....	36
<i>EEOC v. Radiator Specialty Co.</i> , 610 F.2d 178 (4th Cir. 1979) .....	33
<i>EEOC v. Rath Packing Co.</i> , 787 F.2d 318 (8th Cir. 1986), <i>cert. denied</i> , 107 S. Ct. 307 (1986) .....	33, 49
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984) .....	41
<i>EEOC v. St. Louis-San Francisco Ry. Co.</i> , 743 F.2d 739 (10th Cir. 1984) .....	35
<i>Fadhal v. City and County of San Francisco</i> , 741 F.2d 1163 (9th Cir. 1984) .....	35
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) .....	33
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	28, 47
<i>General Building Contractors Association, Inc. v.</i> <i>Pennsylvania</i> , 458 U.S. 375 (1982) .....	31
<i>Giles v. Ireland</i> , 742 F.2d 1366 (11th Cir. 1984) .....	25

<i>Grant v. Bethlehem Steel Corp.</i> , 635 F.2d 1007 (2nd Cir. 1980), <i>cert. denied</i> , 452 U.S. 940 (1981) .....	26, 36, 37, 48
<i>Green v. USX Corp.</i> , 843 F.2d 1511 (3rd Cir. 1988), <i>petition for cert. filed</i> , 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141) .....	41
<i>Griffin v. Carlin</i> , 755 F.2d 1516 (11th Cir. 1985) .....	41, 42
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	23, 24, 25, 27, 33, <i>passim</i>
<i>Guardians Ass'n v. Civil Service Commission of the</i> <i>City of New York</i> , 463 U.S. 582 (1983) .....	45
<i>Hazelwood School District v. United States</i> , 433 U.S. 299 (1977) .....	1, 27, 29, 30, 32, <i>passim</i>
<i>James v. Stockham Valves and Fittings Co.</i> , 559 F.2d 310 (5th Cir. 1977), <i>cert. denied</i> , 434 U.S. 1034 (1978) ....	25, 27
<i>Johnson v. Uncle Ben's, Inc.</i> , 657 F.2d 750 (5th Cir. 1981), <i>cert. denied</i> , 459 U.S. 967 (1982) .....	44
<i>Keyes v. School District No. 1</i> , 413 U.S. 189 (1973) .....	45
<i>Laffey v. Northwest Airlines, Inc.</i> , 567 F.2d 429 (D.C. Cir. 1976), <i>cert. denied</i> , 434 U.S. 1086 (1977) .....	34
<i>Latinos Unidos De Chelsea v. Secretary of Housing</i> , 799 F.2d 774 (1st Cir. 1986) .....	41
<i>Legate v. Maloney</i> , 334 F.2d 704 (1st Cir. 1964), <i>cert. denied</i> , 379 U.S. 973 (1965) .....	37
<i>Lewis v. Bloomsburg Mills, Inc.</i> , 773 F.2d 561 (4th Cir. 1985) .....	41, 44, 46
<i>Lilly v. Harris-Teeter Supermarket</i> , 720 F.2d 326 (4th Cir. 1983), <i>cert. denied</i> , 466 U.S. 951 (1984) .....	50
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981), <i>cert. denied</i> , 459 U.S. 823 (1982) ...	34
<i>Mackey v. National Football League</i> , 543 F.2d 606 (8th Cir. 1976), <i>cert. dismissed</i> , 434 U.S. 801 (1977) .....	31
<i>Markey v. Tenneco Oil Co.</i> , 635 F.2d 497 (5th Cir. 1981) .....	29, 30
<i>Mayor of Philadelphia v. Educational Equality League</i> , 415 U.S. 605 (1974) .....	35



<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	24, 29, 33, 44
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986).....	36
<i>Moore v. Hughes Helicopters, Inc.</i> , 708 F.2d 475 (9th Cir. 1983) .....	33, 44, 46
<i>Moze v. Jeffboat, Inc.</i> , 746 F.2d 365 (7th Cir. 1984) .....	34
<i>Mt. Healthy City Board of Education v. Doyle</i> , 429 U.S. 274 (1977) .....	42
<i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136 (1977).....	23, 36, 45, 47
<i>New York Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	27, 28, 35, 43, 47
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983) .....	45, 46
<i>Patsy v. Florida Board of Regents</i> , 457 U.S. 496 (1982) ...	44
<i>Paxton v. United National Bank</i> , 688 F.2d 552 (8th Cir. 1982), <i>cert. denied</i> , 460 U.S. 1083 (1983) .....	27
<i>Payne v. Travenol Laboratories, Inc.</i> , 673 F.2d 798 (5th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1038 (1982) .....	27
<i>Pullman Standard v. Swint</i> , 456 U.S. 273 (1982).....	30
<i>Rowe v. General Motors Corp.</i> , 457 F.2d 348 (5th Cir. 1972) .....	32, 33
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984), <i>cert. denied</i> , 471 U.S. 1115 (1985).....	33, 34, 46
<i>Square D Co. v. Niagara Frontier Tariff Bureau, Inc.</i> , 476 U.S. 409 (1986) .....	44
<i>Steelworkers v. Weber</i> , 433 U.S. 193 (1979) .....	27
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	24, 25, 26, 27, 28, <i>passim</i>
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	35, 44, 45, 49
<i>Trans World Airlines, Inc. v. Thurston</i> , 469 U.S. 111 (1985) .....	23, 30, 45, 46, 49

<i>Trout v. Lehman</i> , 702 F.2d 1094 (D.C. Cir. 1983), <i>vacated on other grounds</i> , 465 U.S. 1056 (1984) .....	33
<i>United States Postal Service Board of Governors</i> <i>v. Aikens</i> , 460 U.S. 711 (1983) .....	22, 40
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	42
<i>Vuyanich v. Republic National Bank</i> , 521 F. Supp. 656 (N.D. Tex. 1981), <i>vacated and remanded on other grounds</i> , 723 F.2d 1195 (5th Cir. 1984), <i>cert. denied</i> , 469 U.S. 1073 (1984) .....	46
<i>Wambheim v. J.C. Penney Co.</i> , 705 F.2d 1492 (9th Cir. 1983), <i>cert. denied</i> , 467 U.S. 1255 (1984) .....	36
<i>Wang v. Hoffman</i> , 694 F.2d 1146 (9th Cir. 1982).....	34, 35
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	23, 47
<i>Watson v. Fort Worth Bank and Trust</i> , 108 S.Ct. 2777 (1988).....	25-26, 34, 39, 40, <i>passim</i>
<i>Western Air Lines, Inc. v. Criswell</i> , 472 U.S. 400 (1985) .....	45, 46, 47
<i>Williams v. Owens-Illinois, Inc.</i> , 665 F.2d 918 (9th Cir. 1982), <i>cert. denied</i> , 459 U.S. 971 (1982).....	29, 30

### Statutes

42 U.S.C. § 1981 .....	1, 50
42 U.S.C. § 2000e-2(a)(2).....	21, 22, 23, 35-36, <i>passim</i>
42 U.S.C. § 2000e-2(j) .....	21, 26
42 U.S.C. § 2000e-8(c) and (d) .....	42, 43

### Rules

Fed. R. Civ. Pro. 8(c).....	44
Fed. R. Evid. 301.....	45

### Texts

J. Chadbourn, 9 <i>Wigmore on Evidence</i> §2486 (1981).....	45
E. Cleary, <i>McCormick on Evidence</i> §337 (3rd Ed. 1984) ...	45
D. Louisell and C. Mueller, 1 <i>Federal Evidence</i> , §66 (1977) .....	45
J. Moore 2A <i>Federal Practice</i> ¶ 8.27[4] (1987) .....	44, 45
J. Weinstein and M. Berger, 1 <i>Weinstein's Evidence</i> , (1988).....	44
C. Wright and A. Miller, 9 <i>Federal Practice and Procedure</i> §2588 (1971).....	31, 37

### Regulations

29 CFR § 1602 .....	29, 42
29 CFR § 1607 .....	29, 42
29 CFR § 1607 (1978) .....	42
29 CFR § 1608.....	40

### Legislative Materials

118 Cong. Rec. 7166 (1972) .....	44
43 SR 38, 312 (1978) .....	42
H.R. Rep. No. 92-238 (1971).....	41, 48
H.R. Rep. No. 92-415, p. 5 (1971) .....	41, 44

## STATEMENT OF THE CASE

### 1. INTRODUCTION

This class action under Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 challenges a pattern of racial segregation in jobs, housing and messing at three Alaska salmon canneries.<sup>1</sup> The employers are Wards Cove Packing Co., Inc. ("WCP"), which owns Wards Cove and Red Salmon canneries, and Castle & Cooke, Inc. ("BBS"), which owns Bumble Bee cannery. (App. Cert. I:4-5.<sup>2</sup>) Because it involves migrant, seasonal work, the case has unique features.

First, the work force<sup>3</sup> of the Alaska salmon canning industry is—as is true of other migrant, seasonal industries—far more heavily non-white than the areas from which it is drawn. (J.A. 90, 93-95, 103-4, 369, 372-73; *see also* Tr. 336-37, 344, 423, 434-35, 483, 607.) For the eight decades spanning 1906-78, it has been 47-70% non-white. (App. Cert. I:42.) While non-whites in the industry in recent years have been largely of Filipino or Alaska Native descent, workers of Chinese, Japanese and Mexican descent preceded them, but left the industry,

<sup>1</sup>The case originally encompassed two other canneries—namely, Ekuk and Alitak, which are run by WCP and BBS as part of their Columbia Wards Fisheries ("CWF") joint venture. (App. Cert. I:4-6.) Title VII claims against CWF were dismissed on procedural grounds. *Atonio v. Wards Cove Packing Co.*, 703 F.2d 329 (9th Cir. 1983). Title VII claims against WCP and BBS for their role in the CWF venture were dismissed on the ground they were outside the scope of the EEOC charges (App. Cert. I:95-96, III:14, VIII:2), although the charges allege "each discriminates throughout its Alaska operations in Alitak . . . and other facilities." (Ex. 1-3, 5-10; R.P.O. 132.) The charges were later amended to clarify they cover WCP and BBS as joint venturers. (Ex. 31-35; R.P.O. 132, 134.) The district court dismissed 42 U.S.C. § 1981 claims and the court of appeals affirmed. (App. Cert. I:96-97, I:129-30, III:15-43, VI:16.) This Court declined to grant certiorari on issues which affect claims involving the CWF canneries. (No. 87-1388.)

<sup>2</sup>"App. Cert." refers to the appendix to the petition for certiorari, "J.A." to the joint appendix, "E.R." to the excerpt of record, "R.P.O." to the revised pretrial order and "Tr." to the transcript of proceedings.

<sup>3</sup>"Work force" refers to those employed by an employer or an industry. (See J.A. 90-91, 369-70.) "Labor force" or "labor supply" refers to individuals employed in and rejected applicants for work in an industry. (See *ibid.*) "Labor market" refers to areas from which workers are or could be hired. See *Hazelwood School District v. United States*, 433 U.S. 299, 308, 310-12 (1977).



in part because of changes in immigration laws. (Ex. 625; Tr. 345-46, 433, 771, 775; App. Cert. I:42.)

Second, because of the migrant, seasonal nature of the work, WCP and BBS provide bunkhouses as well as meals to employees (App. Cert. I:17), so patterns of segregation extend beyond jobs into several layers of an employee's life (see p. 19-21, *infra*). Whether because of the extent of the segregation or for other reasons, there is "pervasive" race labelling (App. Cert. VI:33) of jobs, bunkhouses and messhalls, with terms such as "Native Crew," "Filipino cannery worker," "Phillipine [sic] Bunkhouse," "Native Galle[ly] Cook" and "Filipino Mess" in use. (App. Cert. I:76-77.) Even the salmon butchering machine has a name with racial overtones, the "Iron Chink." (App. Cert. VI:33; see also *id.* at I:22.)

Third, because the industry is seasonal, workers often have other pursuits during the rest of the year, so their jobs with WCP or BBS do not necessarily reflect the full measure of their skills. Of the ten named plaintiffs, seven had some college when they worked in the canneries. (J.A. 38, 52; Tr. 951-52, 1036, 1050, 2214-15; Dep. Viernes-1975 3-4.<sup>4</sup>) One was a structural engineer when he sought but was denied an upper-level job. (App. Cert. I:86.) Others later became architects (Tr. 951, 2214), mechanics (Tr. 869-70, 872; 2061(a)), a captain in the Air Force (Tr. 2215) and a graduate student in public administration (Tr. 76). Several were students when they worked for WCP or BBS, but they held menial jobs, while white students frequently held choice jobs. (J.A. 78, 114, 118; Tr. 1010, 1320-21, 1373, 2534-35, 2838-39, 2926-27, 3315.) Whites were hired as deckhands as early as age 14, 17 and 18 (J.A. 196-97, 200; Tr. 2757-58), as fishing boat crew members as early as age 15 (Dep. Aiello 30), on the beach gang as early as age 16 (Tr. 2652-53) and as machinist helpers as early as age 16 (J.A. 133-34). Since they live in coastal regions, residents of the Alaska Native villages where WCP and BBS recruit often have vast boating and fishing experience, which more than qualifies them for almost any tender or fishing job. (See J.A. 414, 418-19; *cf. id.* at 362-63.)

<sup>4</sup>A number of witnesses testified by deposition, which were admitted in evidence. (Tr. 2291.)

Some non-white employees have been working in the canneries for decades without promotion (Tr. 953, 967), but could have acquired skills for other jobs.

## 2. RACIAL STRATIFICATION IN JOBS

The court of appeals accepted statistics showing racial stratification in jobs as proof of disparate impact, regardless of the racial mix of the labor supply. (App. Cert. VI:14-17.) Because the subjective criteria on which WCP and BBS rely have a disparate impact on non-whites, the court of appeals did not require the employees to offer statistics differentiated by qualifications. (*Id.* at VI:17, VI:24-27.)

While the degree varies, the administrative, machinist, fisherman, tender, carpenter, beach gang, clerical, quality control and miscellaneous departments are all white or heavily white. (Ex. 588-90 (E.R. 35-37); Tr. 2231, 2261.) By contrast, the largest department—cannery worker—is heavily non-white. (*Ibid.*) At one cannery, the laborer department is also heavily non-white. (Ex. 589 (E.R. 36); Tr. 2231, 2261.) For the Court's convenience, work force statistics offered by each side are contained in Appendices A and B.<sup>5</sup>

### A. Job Departments

Cannery machinists operate and maintain machinery, but despite the similarity in name, are not true machinists as the term is used in the Lower 48. (J.A. 399, 541-42.) They are apparently called machinists because they are represented by the machinists union. (*Ibid.*) Their supervisors characterized them—in interviews with the WCP and BBS expert on qualifications—as machine operators almost as frequently as they described them as craft workers. (Tr. 2955.) The machinist crew is a small one, supervised by two skilled foremen—the cannery foreman and first machinist—who oversee all major

<sup>5</sup>The main difference between each side's statistics in Appendices A and B is in the way vacancies are counted. The employees counted year-round employees once at the initial point of hire in the job in question and seasonal employees each season they were hired or re-hired. (Tr. 2234-36.) The employers omitted year-round employees, counted seasonal employees only in the year they were first hired in a job and eliminated seasonal employees who worked some of the winter months at Lake Union Terminals, a CWF subsidiary. (J.A. 261-62.)



and many minor repairs,<sup>6</sup> a division of duties which reduces the need for skills among the machinists themselves. Machine overhauls are done in the winter in Seattle rather than at the cannery by the machinists. (J.A. 709; Dep. Snyder 34; Dep. Mullis 32; Dep. Jorgensen 28; Dep. Rohrer 11-12.) While not always available, manufacturer's representatives assist with some machine repairs and set-ups. (Tr. 239, 3062-63; Dep. Snyder 34-36; Dep. Rohrer 10-11; Dep. Jorgensen 27-29; Dep. Mullis 32-34.)

The quality control job is often filled by a college student, who receives on-the-job orientation in conducting the necessary tests. (See J.A. 78-79.)

Fishing boats in Bristol Bay—the only locale where WCP and BBS have employee fishermen (J.A. 179)—are small vessels which are limited by Alaska law to 32' in length. They are staffed by two people, a captain and a puller. (J.A. 180-81; Tr. 902(c).)

Tenders bring the fish from the fishing boats to the cannery grounds. (Tr. 1144.) They have crews usually of four (*ibid.*), so the tender cook prepares family-size meals (Tr. 124, 2384-85), although sometimes in Bristol Bay the cook also feeds fishermen (J.A. 21). Lacking brine refrigeration, dry tenders generally stay less than a day from shore, since salmon must be processed within 48 hours of catch. (Tr. 1144; App. Cert. I:21.) Because they can chill the catch, brine tenders make longer voyages. (*Ibid.*; Tr. 1144.) The major repair work on tenders is done at the CWF shipyard in Seattle before the season rather than in Alaska by the tender crews. (Tr. 2385.) Once at the cannery, port engineers help tender engineers with some repairs. (J.A. 124; Tr. 123; Dep. Milholland 12; Dep. Rohrer 24; Dep. Jorgensen 25.) There are no licensing requirements for tender jobs. (Dep. Leonardo-1978 14; Dep. J. Brindle 18-19.)

Beach gang involves largely laborer work (*cf.* Tr. 1514; App. Cert. I:66-67) for which unskilled personnel have been hired. (*e.g.* Tr. 1546; Dep. Sifferman-1980 30, 33-34, 41).

### B. The Statistics

Each side's statistics show between six and seven upper-

<sup>6</sup>J.A. 119, 542-43; Tr. 239, 708-09, 3062-64, 3267; Dep. Snyder 15, 23; Dep. Rohrer 4-7; Dep. Jorgensen 18-19; Dep. Mullis 14-15, 22-23, 26-27, 29; Dep. Landry 24-25.

level departments at Bumble Bee during 1971-80 were at least 90% white, although the cannery worker department was between 52% and 59% non-white. (Ex. 588 (E.R. 35); Tr. 2231, 2261; Ex. A-278 Table 4 SN (E.R. 4); Tr. 2646-47; App. A-1, B-1.) During this period there were 741 hires counting re-hires and 335 hires not counting re-hires in departments which were at least 90% white. (*Ibid.*)

Each side's statistics show five upper-level departments at Red Salmon during 1971-80 were at least 94% white, although the cannery worker department was between 64% and 70% non-white. (Ex. 589 (E.R. 36); Tr. 2231, 2261; Ex. A-278 Table 4 RS (E.R. 3); Tr. 2646-47; App. A-2, B-2.) During this period, there were 384 hires counting re-hires and 152 hires not counting re-hires in departments which were at least 94% white. (*Ibid.*)

Each side's statistics show between four and six upper-level departments at Wards Cove during 1971-80 were at least 93% white, although the cannery worker department was between 31% and 37% non-white. (Ex. 590 (E.R. 37); Tr. 2231, 2261; Ex. A-278 Table 4 WC (E.R. 2); Tr. 2646-47; App. A-3, B-3.) During this period, there were 612 hires counting re-hires and 227 not counting re-hires in departments which were at least 93% white. (*Ibid.*)

Even departmental figures do not tell the whole story. Fully 61 of 95 job titles filled more than once at Bumble Bee were at least 90% white or 90% non-white during 1971-80. (Ex. 598 (E.R. 38-44); Tr. 2231, 2261.) During the same period, fully 62 of 93 job titles filled more than once at Red Salmon were at least 90% white or 90% non-white. (Ex. 599 (E.R. 45-51); Tr. 2231, 2261.) Similarly, at Wards Cove during 1971-80, fully 54 of 72 job titles filled more than once were at least 90% white or 90% non-white. (Ex. 600 (E.R. 52-56); Tr. 2231, 2261.)

The wage disparities between the upper-level and lower-level jobs are extreme, with upper-level jobs often paying three or four times as much as lower-level jobs for a season only about a month longer. (Ex. 598-600 (E.R. 38-56); Tr. 2231, 2261; App. Cert. VI:17.)

The recent job segregation reflects a long standing pattern both at WCP and BBS canneries and industry-wide. From 1949, when WCP purchased the cannery, until 1972, the machinists, tendermen, storekeepers and clerical workers at Red

Salmon were 100% white, while cannery workers were heavily non-white. (J.A. 151-52, 154.) For the same quarter century, some Alaska Natives but no Filipinos, Chinese, Japanese or blacks worked on the beach gang or as company fishermen. (*Ibid.*) Similarly, industry-wide statistics show tender jobs were between 90% and 99% white each year during 1907-39 and 1941-55, although the industry as a whole was between 47% and 70% non-white. (Ex. 63<sup>7</sup> (E.R. 21-34); Tr. 771, 776; App. Cert. I:42.)

### 3. RACE LABELLING OF JOBS

Race labelling at the highest levels of management enforces the racial identifiability of jobs and departments. (See App. Cert. VI:33; *see also id.* at I:76-79.) While a more extensive recap is contained in Appendix C, the employees summarize some of it here.

Far from condemning race labelling, Alec Brindle—WCP's current president—testified cannery workers are called "the Native crew" for "mere ease or habit of identification," since "[o]ne would normally assume, if you recruited from a Native or Eskimo village, the people who came from there . . . would often be referred to in that manner . . ." (J.A. 156-57, 182-83.)

A.W. Brindle, who until 1977 was president of WCP and superintendent of Red Salmon, referred from 1970 on to resident cannery workers<sup>8</sup> as "Eskimo labor," "these Eskimos," "Eskimo males," "Young native boys," "those natives," "Eskimos," "those Natives" and "the Eskimos" (App. Cert. I:24, I:28; Ex. 245, 254, 397, 452, 721, 749-50; R.P.O. 132, 145, 154; Tr. 2279); non-resident cannery workers as "the Filipinos" (Ex. 484, 497; Tr. 2279); other employees as "the four natives that work with Vern" (Ex. 376; R.P.O. 132, 153); salmon butchering machines as "chinks" and the operator as the "chink man" (Ex. 289; R.P.O. 132, 147); the flight carrying non-resident cannery workers as the "Filipino Charter Flight" (Ex. 502; Tr. 2279); and Local 37, ILWU as the "Filipino Union" (Ex. 328, 508; Tr. 311, 313, 2279). He also wrote,

<sup>7</sup>The "transporters" in Exhibit 63 are tendermen who bring fish from the fishing grounds to the cannery. (See Tr. 860.)

<sup>8</sup>"Resident" cannery workers are those who normally reside in Alaska and "non-resident" cannery workers those who normally reside in the Lower 48. (App. Cert. I:29-30.)

[T]hese Eskimos are completely impossible. We have had nothing but trouble and we probably had less trouble than the majority . . . . There is no question in my mind that the Eskimo labor is going to be less desirable as time goes on and actually it will be a detriment. The trouble comes pretty much from these younger ones that have gone to college.

(App. Cert. I:79; Ex. 452; Tr. 2279.)

Warner Leonardo, superintendent of Bumble Bee, referred from 1970 on to non-resident cannery workers as the "Filipino cannery crew," "21 Filipino" and the "Filipinos" (J.A. 216; Ex. 294, 407, 414; R.P.O. 132, 148, 155); classified employees as "Women cannery workers," "Filipino cannery workers," "Native cannery workers," "Japanese," "Filipinos," "Natives" and "Native Galley Cook" (Ex. 327, 342-50; R.P.O. 132, 150-51); and called cannery worker sign-on pay "Filipino sign-on pay" (Ex. 414; R.P.O. 132, 155). Badge assignments at Bumble Bee include, "09-525 thru 09-574 Filipinos" and "09-575 thru 09-659 Natives". (App. Cert. I:77-78.)

Even laundry bags and mail slots are marked with racial designations like "Oriental Bunkhouse." (App. Cert. I:78.)

### 4. SEGREGATED HIRING CHANNELS

The district court did not directly address use of essentially segregated hiring channels, but the court of appeals found the practice had an obvious disparate impact for which—on the findings made—there was no business necessity. (App. Cert. VI: 27-32.)

WCP and BBS solicit for low-paying cannery worker jobs in Alaska Native villages, such as Tuluksak, Kwethluk and Napas-  
iak, which are 96-99% Alaska Native.<sup>9</sup> Typically, a bush pilot or village leader lines up the workers at the direction of the home office or the cannery superintendent. The practice cuts village residents off from the more desirable jobs, which are filled in the Lower 48 through different channels. (See p. 9-10, *infra.*) WCP and BBS hire laborers from heavily Alaska Native areas immediately around the canneries. (App. Cert. I:32, I:38.)

<sup>9</sup>App. Cert. VI:28; Ex. 480; Tr. 2026; Ex. A-382; Tr. 1390-31, 1433; J.A. 4-5; Tr. 637-40, 1125, 2527-28; Dep. Leonardo-1975 41-42; Dep. Leonardo-1978 7-8; *see also* Tr. 2439; Dep. Ekern-1978 10-11; Dep. W.F. Brindle-1978 17-18.



WCP and BBS also recruit for low-paying cannery worker jobs through cannery worker foremen of Asian descent and Local 37, ILWU, a union whose membership is largely Filipino. (App. Cert. I:36, VI:38; J.A. 3-6, 223, 645-46; Tr. 2923-25, 3120-21, 3136.) The parties stipulated,

The majority of non-resident cannery workers are lined up by the cannery worker foremen after management has estimated the number that will be needed.

(J.A. 3.) The foremen are management, for the Local 37 labor contract provides they "...shall be selected by the Company ... [and be] representative[s] of and responsible to the Company." (Ex. A-1 through A-11, Local 37, ILWU; Tr. 2345-46; see also *id.* at 3136) (emphasis added). The racial impact of this recruitment is evident in a letter from a foreman to the Alitak superintendent.<sup>10</sup>

Yes, the entire crew will be Asians, unless Local #37 slips a 'stray' in there. However, anytime you want some more whites or blacks, just let me know as I can recruit some good ones, I believe.

(Ex. 394; Tr. 3121, 3140-41.)

The upshot is every cannery worker hired under the contract was initially selected by the company, for the union has no formal role in selecting employees. Under the contract, first preference goes to past company employees at the same cannery, second preference to past company employees at a different cannery and third preference to,

Persons satisfactory to the Company, including but not limited to Union members or men recruited for employment by the Union.

(Ex. A-1 through A-11, Local 37, ILWU (e.g. E.R. 1); Tr. 2345-46.) (Emphasis added.) A number of cannery workers testified they were hired directly by the foreman. (J.A. 53, 817-18, 926.) Local 37 does not have an exclusive hiring hall, for its contract simply provides,

Persons selected and employed by the Company shall register with the Union, or their names shall be furnished

<sup>10</sup>Evidence of policies at Ekuk and Alitak is relevant, for while they are no longer covered by the case, their policies were set by WCP and BBS. The district court found WCP and BBS "operated the [CWF joint] venture jointly and equally" and set its "hiring policies, firing policies, promotion policies and employee regulations." (App. Cert. I:5, I:26.)

to the Union by the Company prior to leaving port of embarkation.

(Ex. A-1 through A-11, Local 37, ILWU; Tr. 2345-46.) Some nonresident cannery workers—particularly women, who are nearly all white—are hired at company offices with no contact with the union. (R.P.O. 17; 'A. 4-6, 459-62; Tr. 646-47, 695, 939-40, 2593, 2600, 2935, 2949.)

Hiring channels for cannery workers are clearly isolated, for as WCP's president testified, "None of the cannery worker foremen ... is vested with authority to hire for any position outside the cannery worker department" or "to even discuss those jobs on behalf of management." (J.A. 156-57, 163.) Nor are the bush pilots who recruit in Alaska Native villages. (Tr. 2527-28.)

Word-of-mouth recruitment is the norm in filling upper-level jobs, a fact freely conceded by nearly all management witnesses.<sup>11</sup> Nearly all the people who recruit this way for upper-level jobs are white. (See Ex. 598-60 (E.R. 38-56); Tr. 2231, 2261.)

The Bumble Bee cannery superintendent acknowledged a "preference [in all upper-level jobs] for people who have been recruited over people who have applied on a walk-in basis." (J.A. 216, 229-30; see also *id.* at 222-24.) WCP's president testified—as in essence did Bumble Bee's cannery superintendent—fish boat captains have "complete latitude in hiring" crew members. (J.A. 156, 180-81; see also *id.* 460; Tr. 1514, 3163.) One cannery superintendent wrote an applicant,

It is pretty much the universal practice that each captain selects crew members .... It is not simple, of course, to find captains who are looking for crew men as they usually have relations or friends they think of first when an opening comes up.

(Ex. 464; Tr. 2537-38; see also Ex. 465; Tr. 2279.) (Emphasis added.) Tender captains—who are given discretion in hiring because they live in close quarters with their crews—often select friends and relatives. (Tr. 631, 1141, 1374, 2909; Dep. Leonardo-1978 13; Dep. Ekern-1978 15; Ex. 603-605 (E.R.

<sup>11</sup>App. Cert. VI:38; R.P.O. 16-18; J.A. 13-15, 222-24, 229-30; Tr. 627-37, 1146, 2772; Dep. Gilbert-1975 98; Dep. Snyder 4-5; Dep. Lessley 7-8; Dep. Leonardo-1978 13; Dep. A.W. Brindle-1975 27-29, 77; Dep. Landry 4, 12.



65-101), 603-10 (E.R. 102-104); Tr. 2231, 2237, 2244-46, 2261.) WCP's president acknowledged, "the machinists' foreman would generally select his own crew, just like the skipper of a cannery tender selects his crew." (Dep. A.W. Brindle-1975 28.)

WCP and BBS do not publicize vacancies in upper-level jobs. (App. Cert. I:28-29.) Nor do they generally require written applications for upper-level jobs. (J.A. 225; Tr. 1316-17, 2917-19; Dep. Leonardo-1975 26; Dep. Aiello 32; Dep. A.W. Brindle-1975 77; *see also* Dep. Bozanich 24.)

The court of appeals commented the disparate impact of segregated hiring channels is "obvious." (App. Cert. VI:28.) During 1971-80, 90% of non-whites at Bumble Bee, 80% of non-whites at Red Salmon and 90% of non-whites at Wards Cove were hired in cannery worker or laborer jobs, while only 40% of whites at Bumble Bee, 22% of whites at Red Salmon and 58% of whites at Wards Cove were. (Ex. 588-90 (E.R. 38-56); Tr. 2231, 2261.) The district court found these imbalances were caused by: (1) tapping Local 37, a union with a "predominantly [sic] Filipino" membership; and (2) hiring from villages near the canneries, where "Alaska Natives comprise a high percentage of the . . . local labor market." (App. Cert. I:32, I:36-38.)

### 5. NEPOTISM IN UPPER-LEVEL JOBS

The district court made confusing findings on nepotism, citing the "pervasive incidence of nepotism," "the nepotism which is present in the at-issue jobs" and "the strength of the nepotism evidence," but writing "the nepotism . . . does not exist because of a 'preference' for relatives." (App. Cert. I:103, I:105, I:114.) The court of appeals reversed, noting, "If nepotism exists, it is by definition a practice of giving preference to relatives." (*Id.* at VI:21.)

Fully 345 of 347 nepotistic hires during 1970-75 at WCP and BBS in eight upper-level departments were of whites,<sup>12</sup> including 129 hires in tender jobs, 93 in fishing jobs, 67 in machinist jobs, 24 in clerical jobs, 15 in beach gang jobs, 9 in carpenter jobs, 6 in quality control jobs and 4 in administrative

<sup>12</sup>The Court of Appeals noted 349 nepotistic hires in four departments at five canneries originally covered by the case. (*See* App. Cert. VI:21.)

jobs. (Ex. 608-10 (E.R. 102-104); Tr. 2231, 2261.) WCP's president tried to justify hiring relatives as "a reasonable business practice," saying "it is the incentive to get the relative back to Alaska or is part of an economic package which makes working for our company more attractive." (J.A. 184.)

### 6. LACK OF OBJECTIVE OR DISCERNIBLE QUALIFICATIONS

The district court commented on the "general lack of objective qualifications" (App. Cert. I:106; *see also id.* at IV:23), finding in essence there were no fixed criteria since "[q]ualifications for any individual position depend to a certain extent on . . . the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors" (*id.* at I:46). The expert WCP and BBS called on qualifications concurred, saying "jobs are often structured around the skills of the people who are available to fill them, rather than the other way around." (Tr. 2941, 3000.)

Bumble Bee's cannery superintendent acknowledged there were no established qualifications, so he "just rel[ied] on [his] own judgment and the judgment of the foreman who [was] hiring." (Dep. Leonardo-1978 2, 46-47; *see also* Tr. 2617, 2642.) A home office employee who recruited in nearly all upper-level jobs acknowledged "there were no set qualifications a person had to meet." (J.A. 105-11.) WCP's president testified qualifications for tender captain, engineer and—to some degree—deckhand jobs are so fluid they vary from boat to boat. (J.A. 210-12; *see also* Dep. E. Sifferman-1980 9.) A fish boss testified "[t]here were no qualifications" for fishing boat crews, since each captain decided what—if any—criteria to impose. (J.A. 582; *see* App. Cert. I:72.) Electing to "take calculated risks," Bumble Bee's cannery superintendent testified he waives what might be considered minimum qualifications. (J.A. 463-67.)

WCP and BBS were unable throughout fourteen years of litigation to identify the qualifications they actually applied. While the district court made findings on qualifications which could be "reasonably required" (App. Cert. I:58), it is clear the qualifications were never actually imposed. The court of appeals observed the district court "did not . . . find that these specific criteria were actually applied," "[t]here is anecdotal evidence

which suggests that these criteria were not applied" and the district court "must make findings as to the job-relatedness of criteria actually applied." (*Id.* at VI:23, VI:25, VI:27.)

On May 28, 1974, the employees served interrogatories asking, "what qualifications [WCP and BBS] required for [each] job . . . including . . . what prior work experience if any and what special training if any were required . . .". (First Interrogs. to Defs. 17.) The answers do not give qualifications as they were applied. One cannery superintendent acknowledged they were his "ideal for qualifications," rather than "qualifications as they were actually imposed at Alitak from 1970 onward." (J.A. 463, 468-69.)

WCP and BBS then offered an entirely different set of qualifications at trial, namely, one which their expert—Larry DeFrance—believed could be "reasonably required" (J.A. 471, 499). The district court adopted DeFrance's hypothetical qualifications verbatim (App. Cert. I:58-71; J.A. 499-508), even though they had never actually been applied.<sup>13</sup>

THE COURT: All right. Mr. DeFrance, in this case, I believe you have already testified that the Defendants have not adopted, to your knowledge, the minimum qualifications that you recommended; is that correct?

THE WITNESS: That's correct. I don't know that they have ever been adopted.

(J.A. 574-75; *see also id.* at 545.) WCP and BBS openly stipulated some employees in upper-level jobs could not meet DeFrance's suggested qualifications.<sup>14</sup> (Tr. 3076-79.) Even so, many are indefinable, for they are phrased as "ability to" per-

<sup>13</sup>The district court also found it takes "extensive experience" or "substantial prior skill and experience" to perform a number of jobs (App. Cert. I:55-57), but did not say what the experience or skill was or what qualifications were actually applied. The employees acknowledge some—but not all—of these jobs require special skills, but they can generally be acquired in entry-level jobs at the cannery. (*See* p. 13-14, *infra.*) The skills necessary for other jobs are by no means apparent. The shop machinist job has been filled by a white who took a night school course, but never served an apprenticeship or worked as a shop machinist. (Dep. Rohrer 22-23.) The port engineer job—which entails repairing tenders and fishing boats—can be filled by one whose only mechanical experience is working on his or her own car. (*Id.* at 25; *see also* Dep. Snyder 43; Dep. Mullis 37.)

<sup>14</sup>Lacking information on the skills or background of their own employees,

form instead of the standards by which such ability is measured, while others are highly subjective. These features of DeFrance's hypothetical qualifications are summarized in Appendix D. Faced with this, the employees offered anecdotal evidence of employees hired on far more modest qualifications than DeFrance's.<sup>15</sup>

WCP and BBS also called lay witnesses on qualifications, but since they almost all lacked hiring authority, they could not say what qualifications were actually imposed. (Tr. 1339, 2357, 2548, 2569, 2617, 2632, 2642, 2742, 2842, 2848, 2884, 3172, 3267, 3272.) Of the qualifications lay witnesses cited, many are in any case entirely subjective. They also are summarized in Appendix D.

Whites advanced from entry-level jobs to the more difficult jobs at the cannery.<sup>16</sup> A cannery superintendent's nephew rose from machinist helper—an unskilled job (App. Cert. I:107-08)—at age 18 to seamer machinist at age 19 to salmon butchering machinist at age 20 to first machinist at age 21, all while he attended college during the winter months. (J.A. 114-22; Tr. 705-10, 770.) White relatives of management progressed to tender captain from tender deckhand, another unskilled job (App. Cert. I:107-08), some starting as early as age 14 (Tr.

WCP and BBS retained a firm to interview some of them in 1980. (*See* Tr. 1144 *et seq.*) From the interviews, DeFrance could say only 80%—155 of 193—of employees in upper-level jobs would have survived even a first cut or prescreening based on his qualifications when first hired from 1971 on. (J.A. 525.) DeFrance did not require they meet the hypothetical qualifications when first hired before 1971 as long as they later acquired the relevant experience. (J.A. 572-73.)

<sup>15</sup>One white dry tender engineer who was related to a CWF home office employee "had no mechanical experience or training other than performing preventative maintenance on his car, and no experience working on a boat." (App. Cert. VI:26; *see also* J.A. 20-21, 22-24; Dep. Millholland 3.) Other white tender engineers had a similar lack of background. (J.A. 60-62; *see also id.* at 123-24, 131-35.) Two whites—one a cannery worker and the other a stockroom clerk—were promoted to machinist jobs without any such experience. (J.A. 25-29, 30-31, 34-37; *see also* Dep. Landry 15-17.) Other machinists could not meet DeFrance's proposed qualifications when first hired. (J.A. 144-45, 500; Tr. 2534-35.)

<sup>16</sup>Even under DeFrance's hypothetical qualifications, upper-level jobs—such as machinist—can be learned largely or exclusively through experience in positions the district court found were unskilled. (J.A. 499, 505; App. Cert. I:107-08.)



1319-20; *see also* J.A. 131-36; *see also* Dep. Sifferman-1978 20). The parties stipulated a fishing boat captain's job can be learned through prior experience as a fishing boat partner. (J.A. 7.)

The effects of the regime of subjectivity are apparent from the same statistics as word-of-mouth recruitment. WCP and BBS do not require written applications (*see* p. 10, *supra*), so there are no systematic applicant flow records. Bumble Bee and Red Salmon destroyed applications through 1977 and Wards Cove through 1979. (Tr. 1143, 1518, 2718, 2773.) Even when they retained applications, WCP and BBS rarely race-identified applicants, so applicant flow figures are unreliable. (Tr. 1403; *see* p. 18 n.20, *infra*.) Given this, one cannot separate the impact of subjective qualifications from the impact of the recruitment process.<sup>17</sup>

## 7. RE-HIRING PAST EMPLOYEES IN THEIR OLD DEPARTMENTS

WCP and BBS have a practice of re-hiring past incumbents in their old departments. (App. Cert. I:29, VI:32.) For union jobs, the practice is memorialized in re-hire preferences in collective bargaining agreements. (*Ibid.*) The district court held the practice did not have a disparate impact, reasoning it could not perpetuate past discrimination unless such discrimination were first proved. (*Id.* at 120-21.) But it also made a hypothetical or alternate finding of business necessity. (*Id.* at 122.) The court of appeals held the practice in fact had a disparate impact since "[w]hen jobs are racially stratified, giving rehire preference to former employees tends to perpetuate existing stratification." (*Id.* at VI:32.) But it affirmed the finding of business necessity (*id.* at 33), despite the absence of any supporting evidence.

<sup>17</sup>While never imposed, DeFrance's requirements—even as a proxy for actual criteria—have a disparate impact on non-whites. WCP and BBS hiring area statistics which incorporate his views on skills show the percent non-white who meet the qualifications is lower than the percent non-white in the general labor force in the hiring areas in every at-issue job family except fishermen and culinary. (Ex. A-278 Tables 1 and 3 WC, RS and SN; Tr. 1929-32, 2231, 2261.) Similarly, DeFrance's review of 1980 employee interviews shows the pass rate of non-white employees under his hypothetical qualifications is less than 80% of the pass rate for whites. (Tr. 1985-86.)

## 8. INDIVIDUAL INSTANCES OF DISCRIMINATION

Twenty-two non-whites testified they applied unsuccessfully for or were deterred from seeking upper-level jobs. (*See* App. Cert. I:84-94.) Many had special skills or rose rapidly with other employers, but were confined to menial jobs at the canneries. (*See* p. 2, *supra*; *see also* J.A. 64; Tr. 806.) The district court did not find any unqualified for the jobs they sought or were deterred from seeking. (App. Cert. I:84-94, VI:30.)

Of the 22, 12 applied orally, in writing or both (App. Cert. I:84-90), but the district court found they applied too early, too late or to the wrong person (*id.* at I:86, I:88-89, I:115-17). When one asked a machinist foreman for work as a machinist, he was asked in turn, "What's wrong with being on the Filipino crew?" (J.A. 52, 56-57.) Others were deterred by foremen who told them they "had to know someone" to be hired as a machinist (J.A. 77), advised them "not to make waves" by seeking promotions (J.A. 76), refused to tell them how to seek upper-level jobs (J.A. 85-86) and said Filipinos "were not supposed to have" upper-level jobs (Tr. 832). Yet others were deterred by segregation in jobs, housing and messing. (App. Cert. I:92-93; Tr. 282, 294, 872-73, 953, 967-68, 1037, 1051-52.) The district court gave little weight to evidence of deterrence, since it believed "the test for . . . discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates." (App. Cert. I:117.) The court of appeals held findings on individual claims were premature until liability issues were resolved. (*Id.* at VI:41.) Beyond noting the deterrent effect of race-labelling, segregation in housing and segregation in messing (*id.* at 33), it held informal, discriminatory hiring practices "should serve to excuse the cannery workers from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications" (*id.* at 41-42).

## 9. THE LABOR SUPPLY

The district court found the percentage of non-whites working in the industry during 1906-39 and 1941-55 "has historically been from about 47% to 70%," "[t]oward the end of this period it stabilized [sic] at about 47% to 50%" and a sample of about half the industry showed it to be 48% non-white during



1970-78. (App. Cert. I:42.)

Since the Census is dominated by people unwilling to take migrant, seasonal work, Drs. Robert Flanagan and Shirley Smith—a labor economist and demographer, respectively—found industry statistics to be the best available measure of the racial mix of the labor supply here. (J.A. 90, 369, 373-78; Tr. 370-73, 571-77.) From these statistics, they concluded the labor supply is about 47% non-white. (J.A. 378-79; Tr. 353, 370.) This figure matches closely: (1) the 47% non-white in all Alaska fruit, vegetable and seafood processing industries as shown by the 1970 Census (Ex. 626; Tr. 347-48, 776); and (2) the 42% non-white in the work forces during 1971-80 of the five canneries covered by this case (Ex. 588-92; Tr. 2231, 2261).

Using the 47% non-white figure, Dr. Flanagan found a pattern of race segregation, with non-whites significantly under-represented in upper-level jobs by margins of two or more standard deviations. (J.A. 379-90; Ex. 634-36 (E.R. 122, 124-25); Tr. 2278.) Skills adjustments were hampered by: (1) the absence of statistics by race on people qualified for the more skilled jobs in the industry (J.A. 100-02; *see also id.* at 373-78); and (2) the lack of objective qualifications at WCP and BBS which would enable one to use such statistics even if they existed (*id.* at 384). Dr. Flanagan compensated for these difficulties by making the extremely conservative assumption WCP and BBS hired every available non-white qualified for truly skilled jobs, basing his computations largely instead on jobs without significant skill barriers. (*Id.* at 384-86.)

By contrast, Dr. Albert Rees—a labor economist for WCP and BBS—concluded the labor supply is about 10% non-white, only about a fifth of the actual percent non-white in the industry since the turn of the century. (J.A. 250, 292.) The district court accepted this view, holding it rebutted the prima facie case of disparate treatment based on work force statistics. (App. Cert. I:41-43, I:118-19, I:124.) The court of appeals did not rule on the labor supply question, which it believed was relevant to disparate treatment but not disparate impact claims. (*Id.* at VI:15-19.)

Faced with a work force which is about 42% non-white, WCP and BBS could justify job segregation only by arguing they hired too many non-whites in the menial jobs rather than

too few in the choice jobs. The centerpiece of their approach was a Census-based study, which bears two unusual features.

First, the study shows an absence of non-whites at statistically significant levels in several departments, which led Dr. Rees to “conclude that [at WCP] non-whites are significantly under-represented in hiring in the tender job family” (J.A. 269-70); “[t]he under-representation of nonwhites” in the tender job family at Red Salmon is “statistically significant at the 5% level” (J.A. 271); and “non-whites were significantly under-represented in hiring in the fisherman and machinist job family at South Naknek [i.e., Bumble Bee]” (J.A. 274; *see also id.* at 289-90). (Emphasis added.)

Second, the study’s non-white availability figure is so low it suggests a striking under-representation of whites in the menial jobs.<sup>18</sup> (J.A. 347; *see also id.* at 356-57.) The suggestion of discrimination against whites arises from an over-inclusive measure of the labor supply.<sup>19</sup> Of the two types of availability

<sup>18</sup>When the figures in the “comps dev” row of the defense labor market tables reach minus 1.96 standard deviations, there is statistically significant under-representation of whites, which raises the inference of discrimination against whites. (J.A. 341; Tr. 1851.) Exhibit A-278 Table 4—the one Dr. Rees prefers (*see* J.A. 267)—shows overall discrimination against whites at Bumble Bee, Red Salmon and Wards Cove at levels ranging from minus 23.139 to minus 10.269 standard deviations. (Ex. A-278 Table 4 WC, RS and SN; Tr. 2647.) They show under-representation of whites at the same facilities in cannery worker and laborer jobs at levels of minus 28.187 to minus 11.537 standard deviations. (*Ibid.*) Similarly, they show under-representation of non-whites at Bumble Bee and Red Salmon in at-issue jobs at levels of minus 4.585 and minus 3.672 standard deviations respectively and under-representation of whites in at-issue jobs at Wards Cove but not at a statistically significant level. (*Ibid.*)

<sup>19</sup>Dr. Rees believed “to the extent” whites are under-represented “it is the result of the influence of Local 37.” (J.A. 298; *see also id.* at 294-95.) But his study shows whites are markedly under-represented at Ekuk, which has no Local 37 workers (*id.* at 342, 344-45, 347-48) and at several canneries in jobs outside Local 37’s jurisdiction (*id.* at 348-49). Similarly, historical statistics show the percentage of non-whites actually declined slightly after Local 37 came into being. (J.A. 96-98.) With whites concentrated in the choice jobs at WCP and BBS (J.A. 355-56), whites dominating management at WCP and BBS (*id.* at 356-57) and discrimination in the society as a whole far more pervasive against non-whites than whites (*id.* at 354-55), Dr. Rees conceded—as did his statistician—the suggestion of discrimination against whites might be a sign his non-white availability figure was too low. (Tr. 1851; J.A. 237, 246-48; *see also id.* at 350-52.)

figures Dr. Rees offered, one makes no effort to adjust for migrant, seasonal work, leading him to repudiate it at trial. (Tr. 1934; *see also* J.A. 2576, 305-07.) The other purports to adjust for availability for seasonal but not migrant work. (J.A. 307-08.) Since it is the migrant rather than the seasonal element of work in the industry which largely accounts for the high percentage of non-whites (J.A. 103-4; *see also* Tr. 403-08), these figures assume away the central issue in defining the labor supply.

Dr. Rees includes people in Alaska fruit, vegetable and seafood processing industries (J.A. 257, 311; Tr. 1598), who are 47% non-white. (*See* p. 16, *supra*.) But he also includes: (1) university professors with no interest in work in this industry (J.A. 310-11, 316-18; *see also id.* at 319-20; Tr. 385); (2) construction workers, whose season peaks at the same time as the salmon season, leaving them largely unavailable for work in the industry (J.A. 310-14; Tr. 382-83); (3) unionized construction workers who might have to forfeit seniority to work in a salmon cannery (J.A. 313-16); (4) construction contractors, whose investment in an on-going business makes them unlikely candidates for migrant, seasonal work (*see* Tr. 1774); (5) year-round workers in industries with a seasonal component, who have no interest in migrant, seasonal work (J.A. 320-21); and (6) all unemployed, regardless of whether they would accept migrant, seasonal work (*see* J.A. 310). With these increasingly remote categories, the non-white availability figure drops from 47% to roughly 10%.

Even WCP and BBS statistics show fully 26% of race-identified applicants in 1978-80 were non-white (Ex. A-133 Table 1; Tr. 1433, 1438), despite the fact they severely underestimate non-white availability.<sup>20</sup>

<sup>20</sup>The statistics were compiled from written applications made directly to company offices. (*See* Tr. 1518, 2718, 2773.) Yet non-whites are hired in the low-paying jobs through oral solicitation by cannery worker foremen, by bush pilots and at Local 37. (*See* p. 7-9, *supra*.) Of 278 applicants for cannery worker jobs, only two were identified as Filipino or Alaska Native (Ex. A-133 Table 3), the non-white groups which contribute most heavily to cannery worker jobs. Beyond this, many race identifications were made on the basis of those ultimately hired. (Tr. 1403.) Since they generally occupy the very departments from which non-whites are excluded, this undercounts non-whites. Finally, employment practices at WCP and BBS deter non-whites from applying for upper-level jobs (*see* p. 15, *supra*), so once again the applications underestimate non-white availability.

## 10. HOUSING SEGREGATION

WCP and BBS house employees at the canneries almost completely along racial lines. (Ex. 615-17 (E.R. 105-19); Tr. 2231, 2261.) The district court found "housing where non-whites predominate has generally been poorer than housing whites predominate [sic]." (App. Cert. I:82.) But it held the disparate impact on non-whites was justified by a desire to avoid winterizing large bunkhouses by opening small ones first for the heavily white crews who arrived early. (*Id.* at I:126-27.) The court of appeals reversed, holding this rationalization "without more" would not "sustain a finding of business necessity." (*Id.* at VI:37.)

One home office employee wrote an applicant for a cannery worker job,

We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups.

(App. Cert. I:81-82, II:1-2; J.A. 105-9.) (Emphasis added.)

Like jobs, bunkhouses are labelled by race. A.W. Brindle, until 1977 president of WCP, referred from 1970 on to cannery worker bunkhouses as "the Filipino house," "the Eskimo quarters" and "the Filipino and Eskimo areas." (Ex. 328, 361, 366; Tr. 2026; R.P.O. 132, 152.) Warner Leonardo, the Bumble Bee cannery superintendent, referred to them from 1970 on as "the native bunkhouse" and the "Filipino house." (Ex. 340; R.P.O. 132, 150.) The recent housing patterns are part of a long tradition of racial segregation in housing. (J.A. 152-54; Tr. 681, 2387; Dep. Leonardo-1978 36; Dep. J. Brindle 24; *see also* Tr. 1348-51.) Housing follows job lines to some degree but by no means exclusively, so assignments cannot be justified solely by time of arrival of different crews.<sup>21</sup> Housing does not follow

<sup>21</sup>Filipino culinary workers are housed with Filipino cannery workers. (J.A. 39, 228; Tr. 672, 2061-62; Ex. 83-87 *passim*; R.P.O. 132, 136-37.) Filipino cannery workers are invariably housed apart from Alaska Native cannery workers. (J.A. 43, 88, 127-28; Tr. 197, 834; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Both groups, which are almost all male, are housed apart from white cannery workers, who are nearly all female. (J.A. 43, 69, 88; Tr. 37, 41, 2202-203; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) These women are housed with males on other white crews, at least at two canneries. (J.A. 43, 69; (cont.)



union lines consistently either.<sup>21</sup>

## 11. MESSING SEGREGATION

Each cannery has two messhalls, of which one is identifiably non-white and the other identifiably white. (E.g. J.A. 45-46, 112-13, 128-29, 141-42; Tr. 36, 162, 196.) The non-white messhall is invariably located in or near the non-white cannery worker bunkhouses. (*Ibid.*) The district court acknowledged the disparate impact of the messing practices on non-whites, but held they were justified by a union contract which provides for a separate culinary crew for Local 37 workers. (App. Cert. I:126-28.) Since the district court also recognized a union contract will not immunize an employer under Title VII (*id.* at 128-29), the court of appeals wrote it was "unsure what the [district court's] conclusion was as to" the disparate impact claim of separate messing (*id.* at VI:38).

Like jobs and bunkhouses, messhalls are often designated by race. A.W. Brindle, until 1977 WCP's president, referred from 1970 on to the "Filipino mess house" and the "white messhouse." (Ex. 359, 426; R.P.O. 132, 152, 156.) Company records refer to the "Filipino mess hall," "native cook" and "native galley cook." (Ex. 300, 347-50, 382, 504; R.P.O. 132, 148, 151, 153; Tr. 2275.) Messing practices should be viewed against the backdrop of a long pattern of segregation. (J.A. 153-

<sup>21</sup>(cont) Tr. 37, 2202-203; Ex. 84-85 *passim*; R.P.O. 132, 136-37.) On occasion, white males performing the same jobs as non-white males are housed separately. (J.A. 69, 628-30; Tr. 341, 2202-03.) Culinary workers for the predominantly non-white messhalls are almost all housed apart from culinary workers for the predominantly white messhalls. (See J.A. 228; Tr. 2067; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Different white crews are commonly housed together. (Tr. 239, 655-57; Ex. 83-85 *passim*; R.P.O. 132, 136-37.)

<sup>22</sup>Male Local 37 members are nearly all non-white, but are housed apart from female members who are nearly all white. (See p. 19 n.21, *supra.*) In turn, female Local 37 workers are housed with white male members of other unions. (See p. 19 n.21, *supra.*) Beachmen, fishermen and certain culinary workers are all members of the Alaska Fishermen's Union. (Ex. A-1 through A-11, Alaska Fishermen's Union; Tr. 2646-47.) Yet they are frequently housed apart from one another. (See, Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Conversely, whites who have different union affiliations or no union affiliation at all are often housed together. (See, e.g., Tr. 239.)

54; Tr. 668; see also Tr. 2589.) Non-white male Local 37 workers are fed separately from white female Local 37 workers. (E.g. J.A. 45-46, 83-84, 112-13, 141-42, 154; Tr. 78-79.) Instead, they are often fed with Alaska Native cannery workers, who are not represented by Local 37. (E.g., J.A. 45-46, 88-89; cf. App. Cert. I:36.)

## SUMMARY OF ARGUMENT

Under § 703(a)(2), it is illegal to "limit, segregate, or classify" employees by race, regardless of what labor market comparisons show. 42 U.S.C. § 2000e-2(a)(2). (Emphasis added.) Title VII's only mention of labor market comparisons is in § 703(j), which discourages labor market defenses because it prohibits "preferential treatment . . . on account of an imbalance" between the race of those hired and those "in the available work force in any community, State, section or other area." 42 U.S.C. § 2000e(2)(j). The labor market showing WCP and BBS urge is a form of "bottom line defense," since it focuses on the number of jobs filled, rather than on limitations of job opportunities. But the Court has squarely rejected "bottom line" defenses to disparate impact claims. *Connecticut v. Teal*, 457 U.S. 440 (1982). Job segregation statistics serve Title VII's prophylactic aim, since they afford certainty, simplicity and ease of use, while labor market comparisons often involve uncertainties and arcane variables. The district court's adoption of the labor market defense here in any case (1) incorrectly assumes the legitimacy of racially segregated hiring channels; (2) stems from a misreading of the union contracts and (3) overrides eight decades of 47-70% non-white employment by finding the labor supply is only 10% non-white.

Skill issues do not detract from job segregation statistics here, because jobs are often unskilled or low-skilled or require only skills which can be acquired at the entry level. Nor were the employees required to offer statistics on non-whites qualified for even ostensibly skilled jobs, since: (1) WCP and BBS failed to identify qualifications actually applied, providing instead qualifications prepared for litigation; (2) WCP and BBS only have subjective criteria, which themselves often mask prejudices or stereotypes; (3) Employees need not show they meet qualifications which have a discriminatory effect, unless the



business necessity of the qualifications is first established.

Housing and messing segregation and race-labelling are prohibited by § 703(a)(2), since—as “dignitary” wrongs (*Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974))—they “adversely affect [one’s] status as an employee.” 42 U.S.C. § 2000e-2(a)(2). Room and board are fringe benefits whose allocation may be challenged on a disparate impact theory. Because they deter non-whites from seeking upper-level jobs, housing and messing segregation and race-labelling all “tend to deprive . . . [non-whites] of employment opportunities.” 42 U.S.C. § 2000e-2(a)(2). Citing only those of the district court’s contradictory findings on nepotism which favor them, WCP and BBS maintain they give no preference to relatives, but even the testimony of WCP’s president establishes a preference.

Despite claims by WCP and BBS, issues of causality are largely absent from this case. The employees offered separate proof of the disparate impact of several practices. WCP and BBS conceded causality in briefs in the court of appeals and this Court. They offered evidence and proposed findings establishing causality in the district court. They omitted causality as a ground for their motion to dismiss for failure to make a prima facie case. Since the district court denied the motion, the sufficiency of the prima facie case is in any event beyond challenge. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The failure of WCP and BBS to articulate their hiring criteria or to maintain systematic records prevented the employees from compiling separate statistics on the impact of subjective qualifications. Even so, employees need not always prove specific practices cause racial imbalances. Congress intended to prohibit “‘complex and pervasive’” discrimination (*Teal*, 457 U.S. 440, 447 n.8), which does not always lend itself to easy correlations between cause and effect. The Uniform Guidelines on Employee Selection Procedures require employers to maintain “records or other information” on the adverse impact of each facet of the overall selection process. 29 CFR § 1607.15A(2)(a). Requiring employees to show causality in every case would make employers the beneficiaries of their own record-keeping violations.

Unlike the “articulation” of a legitimate reason for ostensibly disparate treatment, business necessity is an affirmative

defense on which the employer bears the burden of persuasion, for it allows the employer to prevail by proving facts unrelated to the prima facie case. It entails showing a practice is essential to job safety and efficiency, a standard designed to limit deference to an employer’s belief in the reasonableness of its own practices. Because they set independent standards which serve the same purpose, the Uniform Guidelines provide an alternate standard for business necessity—namely, job relatedness. When it amended Title VII in 1972, Congress ratified this view of the business necessity defense.

Disparate treatment provides an alternate basis for affirming. Segregated hiring channels which funnel employees to race-labelled jobs are facially discriminatory, so the shifting burden analysis is inappropriate. *See TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). But even if it applied, the justifications WCP and BBS offer for racial disparities in treatment—namely, job qualifications prepared for litigation and a misreading of the Local 37 contract—are clear pretext.

## ARGUMENT

### 1. STATISTICS ON JOB SEGREGATION OR PRACTICES WHICH FOSTER IT ESTABLISH DISPARATE IMPACT REGARDLESS OF WHAT LABOR MARKET COMPARISONS SHOW

#### A. The Language of Title VII Makes Job Segregation and Practices Which Promote it Illegal

Under § 703(a)(2), it is illegal for an employer to “limit, segregate, or classify his employees or applicants” in any way which “would tend to deprive any individual of employment opportunities or otherwise adversely affect his status” as an employee because of race.<sup>23</sup> 42 U.S.C. § 2000e-2(a)(2). The statute makes job segregation and practices which promote it illegal *per se*, subject only to the affirmative defense of business necessity. (*See* p. 44 - 45, *infra*.)

<sup>23</sup> Claims of disparate impact arise under § 703(a)(2). *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2783-84 (1988); *Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982); *Satty v. Nashville Gas Co.*, 434 U.S. 136, 144 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971). The Court has not yet decided whether they also arise under § 703(a)(1). *Satty*, 434 U.S. 136, 144.

Segregated hiring channels "limit, segregate, or classify" employees or applicants by the way they are recruited. Since the abilities of individuals recruited through different channels are never compared, non-whites cannot compete effectively on the basis of job qualifications for upper-level jobs. The absence of fixed, objective job qualifications reinforces the effect of separate hiring channels by giving white foremen free rein in selecting their acquaintances. Nepotism "limit[s], segregate[s], or classif[ies]" employees or applicants on the basis of family ties, which gives whites an edge in obtaining upper-level jobs. Similarly, a policy of re-hiring past incumbents in their old departments "limit[s], segregate[s], or classif[ies]" employees or applicants by the jobs they held with WCP or BBS in past seasons. Because jobs are racially stratified, this limits opportunities for non-whites.

"The language of Title VII makes plain the purpose of Congress" to "eliminate those discriminatory practices and devices which have fostered racially stratified job environments. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (emphasis added); see also *Teamsters v. United States*, 431 U.S. 324, 348 (1977). Since the words of the statute are clear, they should be applied as read. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980); *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976). The Court has repeatedly applied the disparate impact analysis to practices which promote job segregation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427, 432 (1971) (transfer criteria operated as "built in headwinds" in plant where "Negroes were employed only in the labor department" while "only whites were employed" in four others); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 409 (1975) (tests inhibited transfers in plant which still carried effects of "racial[ly] identifiabl[e]" lines of progression); see also *Teamsters*, 431 U.S. 324, 344 (dictum).

Contrary to assertions by WCP and BBS, work force statistics are evidence of discrimination in hiring as well as promotions. *E.g.*, *Teamsters*, 431 U.S. 324, 329, 342 n.23 (job segregation statistics accepted where discrimination "in hiring . . . line-drivers" is alleged, since they show "[t]hose Negroes and Spanish-surnamed persons who had been hired . . . were given lower paying, less desirable jobs"); accord *Domingo v. New England*

*England Fish Co.*, 727 F.2d 1429, 1436 (9th Cir. 1984), modified, 742 F.2d 520 (1984); *Carpenter v. Steven F. Austin State University*, 706 F.2d 608, 618, 622-25 (5th Cir., 1983); *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 321-28 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1977). Crediting work force statistics only when an employer announces a policy of promoting from within makes the employer the arbiter of its own discrimination, for it enables the employer to avoid liability by simply declining to announce the policy. Giving work force statistics weight only when the employer promotes from within permits an employer to freely perpetuate job segregation by a systematic failure to promote, which is itself discriminatory.<sup>24</sup> See *Giles v. Ireland*, 742 F.2d 1366, 1381 (11th Cir. 1984) ("The failure to promote would appear to operate to 'freeze' blacks in the lowest . . . categories . . ."); *Griggs*, 401 U.S. 423, 424 (practice which "freeze[s] the status quo of prior discrimination" illegal unless justified by business necessity); see *Teamsters*, 431 U.S. 324, 349-50 (same) (dictum).

#### **B. Even The Labor Market Statistics WCP and BBS Offer Establish a Prima Facie Case For Many Jobs**

While WCP and BBS broadly challenge the sufficiency of the prima facie case, their own statistics establish a significant exclusion of non-whites from several jobs. For these jobs, their labor market and skills contentions are irrelevant.

From the "table[s] that in [his] judgement best enable[ ] one to test the allegations of racial discrimination" (J.A. 267), Dr. Rees acknowledged a statistically significant absence of non-whites in: (1) tender jobs at WCP; (2) tender jobs at Red Salmon; and (3) machinist and fisherman jobs at Bumble Bee (See p. 17, *supra*.) Certainly, an employer "is free to adduce countervailing evidence" if it "discerns fallacies or deficiencies in the data" offered by employees to show disparate impact. *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); see also *Wat-*

<sup>24</sup>WCP and BBS discourage mid-season promotions of Local 37 workers, because they entail paying the same person two season guarantees. (Tr. 1104, 1134, 1352-53; see App. Cert. I:39.) Once the season is over, re-hire preferences and word-of-mouth recruitment inhibit promotions for the next season. (See p. 7-9, 11, *supra*.) But even the relatively few promotions awarded go disproportionately to whites. (See Ex. 613-14; Tr. 2231, 2261.)



son v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2789 (1988) (O'Connor, J.). But the rule has only academic relevance for jobs like these in which even the employer concedes a significant exclusion of non-whites.

Beyond this, Dr. Rees concedes a statistically significant absence of non-whites in other jobs when re-hires are counted, even though his skill and labor market contentions remain intact.<sup>25</sup> They are: (1) fisherman, machinist, tender and carpenter jobs at Bumble Bee; (2) tender and machinist jobs at Wards Cove; (3) tender and fisherman jobs at Red Salmon; and (4) tender and fisherman jobs at WCP as a whole. (J.A. 332-36; Ex. A-280 Table 4 WC, RS, SN and WC-RS; Tr. 2646-47.) Unless re-hire preferences are justified by business necessity, re-hires must be counted, for "treating as unassailable" a right of past incumbents to return in their old jobs in largely white departments "perpetuate[s] impermissibly the result of earlier discrimination." *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1018 (2nd Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); see *Teamsters*, 431 U.S. 324, 349-50, 372-76. For reasons given below, the re-hire preferences are not justified by business necessity. (See p. 48, *infra*.)

### C. Labor Market Comparisons Cannot Rebut or Justify Statistical Showings of Job Segregation

Title VII's only language on labor market comparisons appears in § 703 (j), which prohibits "preferential treatment... on account of an imbalance" between the race of those hired and those "in the available work force in any community, State, section or other area." 42 U.S.C. § 2000e-2 (j). This provision discourages uncritical labor market defenses.

WCP and BBS argue the racial imbalances in their work force are acceptable, because hiring area comparisons show they employ too many non-whites in lower-level jobs rather than too few in upper-level jobs. But this confuses the end with the means, for while hiring area comparisons are evidence of

<sup>25</sup> The tables Dr. Rees prefers count employees only in the first season they held a given job, rather than each season they filled it. (See p. 3, n. 5 *supra*.) But by narrowing the statistical case, they decrease the likelihood any instance of under-representation will be statistically significant. (See Tr. 2121(k)-(l).)

violations (*Hazelwood School District v. United States*, 423 U.S. 299, 307 (1977)), they do not define the violations. "Title VII imposes no requirement that a work force mirror the general population." *Teamsters*, 431 U.S. 324, 340 n.20. Courts, in any case, have rejected precisely the reasoning WCP and BBS urge. *Carpenter*, 706 F.2d 608, 622 (labor market statistics showing non-whites "over-represented" in lower-level jobs do not rebut job segregation statistics in hiring discrimination case).<sup>26</sup>

Section 703(a)(2) "speaks, not in terms of jobs and promotion, but in terms of limitations and classifications."

This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

*Connecticut v. Teal*, 457 U.S. 440, 448, 450 (1982) (emphasis in original). Where practices conspicuously limit opportunities for non-whites, a labor market defense would reverse the focus back from opportunities to jobs, which in turn would encourage employers to adopt not remedial or affirmative goals but exclusionary quotas, which have been historically disfavored. Cf. *Steelworkers v. Weber*, 433 U.S. 193, 208 (1979).

Labor market showings are a form of "bottom line" defense, which are ineffective against disparate impact claims.<sup>27</sup>

Although we noted in passing [in *Dothard*, 433 U.S. 321] that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line."

<sup>26</sup> See also *James*, 559 F.2d 310, 341 (same in hiring and promotion discrimination case); *Paxton v. United National Bank*, 688 F.2d 552, 563-64 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) (same in promotion discrimination case); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982) (hiring area statistics do not rebut applicant flow statistic in hiring discrimination case).

<sup>27</sup> The Court has never insisted on labor market statistics to establish disparate impact, but has instead relied on scores for written exams given by the employer (*Teal*, 457 U.S. 440, 443 and n.4), pass rates for standardized exams compiled in other cases (*Griggs*, 401 U.S. 424, 430 n.6), national height and weight statistics (*Dothard*, 433 U.S. 321, 330) and statewide education statistics (*Griggs*, 401 U.S. 424, 430 n.6). See also *Beazer*, 440 U.S. 568, 585 (where reliable, applicant flow statistics are preferable to hiring area statistics); cf. *Dothard*, 422 U.S. 321, 330 (same).



• • •

The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the opportunity to compete equally with white workers on the basis of job-related criteria.

*Teal*, 457 U.S. 440, 450-51 (emphasis in original).

Three times before *Teal*, the Court rejected labor market defenses. While it found the statistics flawed in *Beazer*, the Court held a disparate impact approach was not precluded by the fact "the percentage of blacks and Hispanics in [the employer's] work force is well over twice that of the percentage in the work force in the New York Metropolitan area." *New York Transit Authority v. Beazer*, 440 U.S. 568, 584 n.25 (1979). Facing criticisms of labor market statistics on disparate treatment claims in *Teamsters*, the Court held,

At best, these attacks go only to the accuracy of the comparison between the composition of the company's work force at various terminals and the general population of the surrounding communities. They detract little from the Government's further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs.

*Teamsters*, 431 U.S. 324, 342 n. 23 (emphasis added). Similarly, confronting disparate treatment claims in *Furnco*, it wrote an employer must "provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

Hiring area statistics cannot rebut job segregation statistics, because they do not answer the violation alleged—namely, among those hired choice jobs are allocated unfairly. Clearly, an employer may not limit non-whites to the same share of its payroll as they comprise in the hiring area, for if they are more heavily represented in its work force than the hiring area, this condemns them to lower wages than whites for reasons unrelated to merit, which is itself discriminatory. Cf. *Bazemore v. Friday*, 478 U.S. 385 (1986). For the same reason, an employer may not limit non-whites to the same percentage of choice jobs as non-whites comprise in the hiring area, for when—as WCP and BBS claim here—they are "over-represented" in an em-

ployer's menial jobs, this ensures a pattern of racial segregation for reasons unrelated to merit, which once again is discriminatory.

Relying on work force statistics facilitates " 'self examination' " and " 'self-evaluation,' " which enable employers to voluntarily "eliminate . . . the last vestiges of discrimination" (*Albemarle*, 422 U.S. 405, 417-18), for they afford certainty, simplicity and ease of use. The Uniform Guidelines and other EEOC regulations require employers to record and report the race of employees in different job categories (29 CFR § 1602.7, § 1602.13, § 1607.4A-B, § 1607.15A(1)-(2)), so employers already have the information necessary to compile work force statistics. By contrast, labor market questions involve uncertainties, such as the effect of weighting schemes (see *Markey v. Tenneco Oil Co.*, 635 F.2d 497, 499 (5th Cir. 1981)), the effect of an employer's recruitment practices (see *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 927 (9th Cir. 1982), cert. denied, 459 U.S. 971 (1982)) and perhaps distortions of the labor market (*Hazelwood*, 433 U.S. 297, 313 n.20). WCP and BBS prevailed here on virtually the same labor market statistics courts rejected in two companion cases involving the same industry. *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 431-33 (W.D. Wash. 1977), reversed on other issues, 727 F.2d 1429 (9th Cir. 1984), modified, 742 F.2d 520 (1984); *Carpenter v. Nefco-Fidalgo Packing Co.*, No. C74-407R (W.D. Wash. May 20, 1982) (order on liability). Far from yielding certainty, reliance on hiring area statistics here " 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Albemarle*, 422 U.S. 405, 417.

WCP and BBS argue reliance on work force statistics would invite employers to reduce the number of non-whites in low paying jobs to eliminate a pattern of job segregation. (Brief of Pet. 21.) But this is simply to say employers will deny non-whites all opportunities if they must afford them equal opportunities, which is no basis for limiting a statute whose aim is "to assure equality of employment opportunities" by eliminating practices "which have fostered" racial segregation in jobs. *McDonnell Douglas*, 411 U.S. 792, 800. WCP and BBS also maintain work force statistics are an unwieldy measure of discrimination, since an employer will not know the percentage of non-whites it employs until after it has finished hiring. (Brief of

Pet. 21-22.) But few employers have turnover so rapid this uncertainty will be meaningful. Even WCP and BBS—seasonal employers who reconstitute their work forces every year (see App. Cert. I:40)—have had a relatively constant percentage of non-whites in their work force for decades. (See, e.g. J.A. 151-53.)

#### D. The Labor Supply Findings Were Induced by Errors of Law

The district court's findings on the labor supply were induced by three errors of law.<sup>28</sup>

First, one of two factors to which the district court attributed the concentration of non-whites in menial jobs is hiring from near the canneries. (App. Cert. I:37-39.) But since it relied on a line of cases which—like *Hazelwood*—define the relevant labor market as the community surrounding the work place (*id.* at I:109), it could not logically discount the effects of the practice by saying it distorts the work force. Recruiting from heavily non-white areas only for lower level jobs can itself be discriminatory. *Domingo*, 445 F. Supp. 421, 433; see also *Williams*, 665 F.2d 918, 927; *Markey*, 635 F.2d 497, 500-01. By assuming the legitimacy of the practice without proof of business necessity, the district court prevented the employees from even challenging it.

Second, the other factor to which the district court attributed the concentration of non-whites in low-paying jobs is Local 37 dispatching. (App. Cert. I:36.) But under its labor contract, Local 37 enjoys no control over selecting non-resident cannery workers. (See p. 8-9, *supra*.) Nor does it have an exclusive hiring hall.<sup>29</sup> (*Ibid.*) The hiring provisions in the Local

<sup>28</sup>The Court may affirm on this basis, even though the court of appeals did not reach it. See *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n. 14 (1985). Findings of fact affected by errors of law are infirm. See *Pullman Standard v. Swint*, 456 U.S. 273, 292 (1982). A remand to re-determine the labor supply is unnecessary, since the errors in the district court's findings signal the inability of WCP and BBS to discredit the job segregation statistics. See *Dothard*, 433 U.S. 321, 331.

<sup>29</sup>If Local 37 has a role in hiring, it is only because WCP and BBS informally delegate authority to it. Yet an employer may not avoid liability under Title VII by delegating management prerogatives to third parties. See *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1089-91 (1983). Whether an informal grant of authority to a union is an "institutional constraint" (cont.)

37 contract are almost identical to those in contracts covering upper-level jobs. (Ex. A-1 through A-11, Local 37, ILWU, Alaska Fishermen's Union, Machinists Union, Carpenters Union; Tr. 2345-46.) Yet neither the employers nor the district court attributed any distortion of the work force to other unions. The district court's erroneous reading of the Local 37 agreement may be freely reviewed on appeal. *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); see also C. Wright and A. Miller, 9 *Federal Practice and Procedure* §2588 p. 750 (1971). Even so, of the five canneries originally covered by this case, only one—Ekuk—does not use Local 37. (App. Cert. I:35, I:37-38.) While it has the lowest percentage of Filipinos (*id.* at 37-38), it has the highest percentage of non-whites generally (Ex. 588-92; Tr. 2231, 2261). Even if every worker from the Lower 48—where Local 37 has jurisdiction—were white, the WCP and BBS work force would still be 29% non-white, because of the number of Alaska Natives. (Tr. 366.)

Third, courts credit hiring area statistics only because,

Absent explanation, it is *ordinarily* to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

*Teamsters*, 431 U.S. 324, 340 n.20 (emphasis added). But since for eight decades this industry has been far more heavily non-white than its hiring areas, the rationale for using such statistics is absent. Even so, WCP and BBS actively recruit for all jobs, so the issue is not whether their work force fairly reflects the areas from which they hire, but whether in recruiting they give whites and non-whites an equal chance at the desirable jobs. On this issue, work force statistics speak eloquently. Significantly, in an industry which has been 47-70% non-white for eight decades, upper-level jobs at WCP and BBS remain at least 90% white. See *Domingo*, 445 F. Supp. 421, 432.

<sup>29</sup>(cont.) is distinct from the issue in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982)—namely, whether an employer who delegates authority to a union in collective bargaining makes the union its agent.



### E. Alleged Skill Requirements Do Not Detract From Work Force Statistics Here

WCP and BBS erroneously suggest work force statistics have no value, since their upper-level jobs require special skills not found generally among their workers.

First, this rationale cannot apply to those jobs which the district court found were unskilled. (See App. Cert. I:107-08.)

Second, this rationale cannot apply to jobs for which the required skills can be acquired through experience in entry-level jobs in white departments (see p. 13-14, *supra*), since experience requirements "cannot be automatically applied to freeze out" non-whites, when "for the years of its segregated policy" the employer did not "afford them an opportunity to acquire experience." *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972).

Third, this rationale cannot apply to jobs which—even assuming the accuracy or pertinence of the district court's findings on qualifications which could be "reasonably required" <sup>30</sup> (App. Cert. I:58)—entail only skills "many persons possess or can fairly readily acquire." *Hazelwood*, 433 U.S. 299, 308 n.13. The district court construed "skills" in a highly rarefied sense, for while this Court held statistics on qualified non-whites are unnecessary for cross-country truck driving jobs (see *id.* at 308 n.13), it ruled they are required for truck driving on the beach (App. Cert. I:108), because in a seasonal industry the particular skill of driving vehicles is "not readily acquirable" (*ibid.*).

For reasons given below, the work force statistics showed disparate impact even for ostensibly skilled jobs.

### 2. THE EMPLOYEES DID NOT HAVE TO OFFER STATISTICS ON QUALIFIED NON-WHITES, SINCE THE EMPLOYERS NEVER IDENTIFIED CRITERIA ACTUALLY APPLIED, THEY LACKED OBJECTIVE QUALIFICATIONS AND THE QUALIFICATIONS THEY DID USE HAD A DISPARATE IMPACT

For three reasons, the employees were not required to offer statistics on qualified non-whites for any jobs here.

<sup>30</sup>See App. Cert. I:66-67, I:70-71, I:73 (quality control, beach gang, truck driver, office assistant and tender cook).

First, WCP and BBS failed to show what hiring criteria were actually applied. Under Title VII, ability is tested only under qualifications actually applied. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976) (back pay defeated only under "non-discriminatory standards *actually applied*"); *Albemarle*, 422 U.S. 405, 433 (use of subjective rankings in validation inappropriate since "no way to determine whether the criteria *actually considered*" were job related) (emphasis in original in each). The burden of proving a job requires special skills or experience rests with the employer.<sup>31</sup> Only qualifications actually applied can be tested for fair application (see *McDonnell Douglas*, 411 U.S. 792, 804) or business necessity (see *Albemarle*, 422 U.S. 405, 433). While—within these limits—Title VII makes qualifications the employer's prerogative (see *Rowe*, 457 F.2d 348, 358), the employer must at least disclose the criteria it applied, for " '[o]ne clear purpose of discrimination law is to force employers to bring their employment processes into the open.' " *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Only then can qualifications be the "controlling factor" Congress intended. *Griggs*, 401 U.S. 424, 436. When an employer fails to disclose criteria actually applied, an employee need not offer statistics on qualified non-whites. *EEOC v. Rath Packing Co.*, 787 F.2d 318, 328, 336 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 307 (1986); *Domingo*, 727 F.2d 1429, 1437 n.4; *Trout v. Lehman*, 702 F.2d 1094, 1102 n.10 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984).

By relying on qualifications prepared for litigation, WCP and BBS adopted a strategy which was rejected in two companion cases. *Domingo*, 445 F. Supp. 421, 437-38; *Carpenter*, No. C74-407R (W.D. Wash. May 20, 1982) (order on liability). An employer may not impose more stringent qualifications on non-whites than whites either in practice (*McDonnell Douglas*, 411 U.S. 792, 804) or in proof (*Domingo*, 445 F. Supp. 421, 438). Even standards which are "reasonable" will not defeat a Title

<sup>31</sup>*EEOC v. Rath Packing Co.*, 787 F.2d 318, 336 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 307 (1986); *Domingo*, 727 F.2d 1429, 1437 n.4; *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 483 (9th Cir. 1983); *Chrysler v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1259 n.5 (6th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 185 (4th Cir. 1979).



VII claim, if they were never imposed during the liability period. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 456-57 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1977).

Second, an employee need not as part of a prima facie case offer statistics on non-whites who meet subjective qualifications. When it endorsed use of statistics on experienced teachers in *Hazelwood*, the Court did not insist on a further showing of non-whites who met the subjective qualifications of " 'most competent' " or " 'personality, disposition, appearance, poise, voice, articulation, and ability to deal with people.' " *Hazelwood*, 433 U.S. 299, 302, 308 n.13. Even where skilled jobs are at issue, courts do not insist on statistics on non-whites who meet subjective qualifications.<sup>32</sup> Since subjective criteria can mask "subconscious stereotypes and prejudices" (*Watson*, 108 S. Ct. 2777, 2786), statistics on them just "measure . . . the amount of discrimination operating through" them. *Segar*, 738 F.2d 1249, 1276. Simply saying—as WCP and BBS do—they look for a "qualified person," "skill" or "experience" is no substitute for having objective qualifications, since " 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' " *Teamsters*, 431 U.S. 324, 343 n. 24. Undefined "job related experience" is not considered objective when—as here—" [e]ach hiring decision [is] made by a cannery superintendent or a foreman on the basis of his personal judgment." *Domingo*, 727 F.2d 1429, 1433.

Third, an employee "cannot be required to prove that he was qualified . . . under a system he alleges to be discriminatory unless the legitimacy of the system is first established." *Wang*

<sup>32</sup> *Segar*, 738 F.2d 1249, 1274-75 (GS-7 to GS-12 positions); *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1294 (7th Cir. 1984) (regional director); *Mozee v. Jeffboat, Inc.* 746 F.2d 365, 372-73 (7th Cir. 1984) (foreperson); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982) (GS 12 positions); *De Medina v. Reinhart*, 686 F.2d 997, 1007 (D.C. Cir. 1982) (technicians, writers and editors); *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339, 342 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982) (accounting supervisor); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1344-45 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (university professor); *Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979) (research chemist); see also *Domingo*, 727 F.2d 1429, 1437 n.4.

*v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982).<sup>33</sup> *Hazelwood*, a disparate treatment case, is distinguishable,<sup>34</sup> since a prima facie case of disparate treatment is designed to raise the inference of illegal intent by eliminating "the two most common legitimate reasons on which an employer may rely" in rejecting applicants, one of which is "an absolute or relative lack of qualifications." *Teamsters*, 431 U.S. 324, 358 n.44; see also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). By contrast, the aim of a prima facie case of disparate impact is to show non-whites fail "in a significantly discriminatory pattern" to meet the qualifications imposed. *Dothard*, 433 U.S. 321, 329. Because the employees showed disparate impact (see p. 39-40, *infra*), they were relieved of the need to offer statistics on qualified non-whites. See *Beazer*, 440 U.S. 568, 585 (statistics on "otherwise qualified" non-whites required when some qualifications remain unchallenged) (emphasis added).

### 3. HOUSING AND MESSING SEGREGATION AND RACE-LABELLING HAVE A DISPARATE IMPACT ON NON-WHITES

Because they "limit, segregate, or classify" employees along racial lines, housing and messing segregation and race-labelling fall within the literal terms of § 703(a)(2)'s prohibition. See 42 U.S.C. § 2000e-2(a)(2). Even if housing and messing are assigned by crew or time of arrival rather than race (see App. Cert. I:126), the racial impact is still clear (see Ex. 615-17 (E.R. 105-19); Tr. 2231, 2261).

WCP and BBS argue these practices do not "tend to deprive any individual of employment opportunities" (42 U.S.C. § 2000e-2(a)(2)), so they survive a § 703(a)(2) challenge. (Brief of Pet. 28-29.) But § 703(a)(2) also covers practices which "adversely affect [an individual's] status as an employee." 42

<sup>33</sup> *Accord EEOC v. St. Louis-San Francisco Ry. Co.*, 743 F.2d 739, 742 (10th Cir. 1984); *Fadhal v. City and County of San Francisco*, 741 F.2d 1163, 1165-66 (9th Cir. 1984); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 225 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985).

<sup>34</sup> See also *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (statistics on qualified non-whites required only when plaintiffs "do not challenge the qualifications for service").

U.S.C. § 2000e-2(a)(2). Since racial segregation is a "dignitary" wrong (*Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974)), it "adversely affect[s]" one's status as an employee. (See, e.g., J.A. 405-06; Tr. 79, 836-37.) "Title VII is not limited to 'economic' or 'tangible' discrimination," but "affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986) (construing § 703(a)(1)).

Second, in any case, room and board are fringe benefits. See e.g. *Domingo*, 727 F.2d 1429, 1446. Claims of discrimination in fringe benefits may be raised under a disparate impact theory.<sup>35</sup> Non-whites lost fringe benefits because largely non-white bunkhouses were "generally poorer" (App. Cert. I:82), less spacious (Ex. 620-22; Tr. 2231, 2261) and often simply squalid (see, e.g., J.A. 39-40, 44-45, 127-28, 143; Tr. 31, 38, 77-78, 162, 197-98, 808, 1039). Non-whites were so dissatisfied with the food they held food strikes.<sup>36</sup> (See, e.g., J.A. 47; Tr. 200, 284.)

Third, segregation in housing and messing "isolate[s] non-whites] . . . from the 'web of information' about higher-paying jobs." *Domingo*, 445 F. Supp. 421, 439. Similarly, it deters non-whites—as does race-labelling—from seeking upper-level jobs, because of the clear message it conveys. (See p. 15 *supra*.) These practices thus "tend to deprive . . . [non-whites] of employment opportunities." 42 U.S.C. § 2000e-2(a)(2).

WCP and BBS argue racial imbalances in housing and messing are due to the abundance of non-whites Local 37 dispatches. (Brief of Pet. 27.) But the district court found on stipulated facts cannery superintendents were "ultimately res-

<sup>35</sup> *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-45 (1977) (under § 703(a)(2)); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 251-52 (6th Cir. 1988); *Coiby v. J.C. Penney Co.*, 811 F.2d 1119, 1126-27 (7th Cir. 1987); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (under § 703(a)(1)).

<sup>36</sup> WCP and BBS say differences in food are due to requests by Local 37, the ability of the cooks and personal tastes of older Filipino crew members. (Brief of Pet. 27-28.) But even if this explained segregated messing for Alaska Natives or feeding largely white Local 37 female workers apart from their largely non-white male counterparts (see p. 21, *supra*), WCP and BBS could not escape liability for the racial differences by delegating decisions to third parties. *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1089 and n.21 (1983); *Grant*, 635 F.2d 1016.

possible for assigning employees to bunkhouses [and] assigning crews to dining areas." (App. Cert. I:37; R.P.O. 9; see also, e.g., J.A. 39, 53-55, 73, 128-29; Tr. 833.) Beyond this, housing and messing assignments often have little to do with job or union affiliation. (See p. 19-20 n. 21-22, *supra*.) WCP and BBS maintain non-whites could "opt out" of discriminatory messing practices by taking occasional meals in largely white messhalls on appropriate notice. (Brief of Pet. 29.) But non-whites who tried to eat in largely white messhalls were sometimes rebuffed. (See, e.g., J.A. 73-74; Tr. 40; see also Tr. 668.) Even so, because messhalls were "assign[ed]" (App. Cert. I:37), non-whites did not have an "entirely voluntary" choice. *Bazemore*, 478 U.S. 385, 408.

#### 4. NEPOTISM HAS A DISPARATE IMPACT ON NON-WHITES HERE

The district court made contradictory findings on nepotism, citing on the one hand its "pervasive" nature, while saying on the other there was no "preference" for relatives. (See p. 10, *supra*.) Invoking only findings in their favor, WCP and BBS disclaim any nepotism, saying relatives were "chosen because of their qualifications" and not "due to inexperience."<sup>37</sup> (App. Cert. I:105, I:122.) But even if the latter findings control, they are premised on too narrow a legal standard, for nepotism can involve preference in recruiting employees and publicizing job opportunities as well as in evaluating qualifications. *Domingo*, 747 F.2d 1429, 1436; *Grant*, 635 F.2d 1007, 1012, 1016-17. On this, WCP's president acknowledged, "[T]here is no doubt relatives have better information as to what jobs are available." (J.A. 156, 183-84.) Significantly, the district court found applications of non-whites often failed because they were untimely or made to the wrong person. (App. Cert. I:115-17.)

During 1970-75, roughly 67% of administrative jobs, 43% of quality control jobs, 39% of clerical jobs, 37% of fisherman jobs, 29% of machinist jobs, 27% of tender jobs and 20% of beach gang jobs were filled by individuals who had a relative at

<sup>37</sup> WCP and BBS argue the findings they cite are not clearly erroneous. (Brief of Pet. 25.) But the "clearly erroneous" rule does not apply to contradictory findings. See *Legate v. Maloney*, 334 F.2d 704, 707-08 (1st Cir. 1964), *cert. denied*, 379 U.S. 973 (1965); C. Wright and A. Miller, 9 *Federal Practice and Procedure* § 2614 p. 812 (1971).



the same cannery in the same or a prior year.<sup>38</sup> The justification WCP's president offered—namely, hiring a candidate's relatives is a way of attracting him or her to the company (*see* p. 11, *supra*)—establishes relatives are hired for reasons other than merit. Finally, the criticisms WCP and BBS offer of the statistics are without real basis.<sup>39</sup>

## 5. THE EMPLOYEES ESTABLISHED CAUSATION

Of the three requirements the court of appeals articulated for a *prima facie* case of disparate impact, one is "show[ing] the causal relationship between the identified practices and the [disparate] impact." (App. Cert. V:19-20.) WCP and BBS conceded this element, for the court of appeals observed "[T]he challenged practices are agreed to cause [the] disparate impact" (*id.* at V:29) and "[T]he companies concede the causal relationship between their hiring criteria and the number of non-whites in the at-issue jobs" (*id.* at VI:24-25<sup>40</sup>). Even in their

<sup>38</sup> *See* Ex. 583-85, 608-10 (E.R. 102-104); Tr. 2231, 2261. Exhibits 608-10 show nepotistic hires for 1970-75, while Exhibits 583-85 show total hires for 1970-80. To compute the ratio of nepotistic to total hires in 1970-75, the employees assumed roughly 55% of the total 1970-80 hires were made in 1970-75.

<sup>39</sup> WCP and BBS argue the statistics fail to exclude persons who become related by marriage after they were hired. (Brief of Pet. 26 n.40.) But they failed to meet their burden of showing this would affect the racial impact apparent from the charts. *See Capaci v. Katz and Besthoff, Inc.*, 711 F.2d 647, 653-54 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984). Similarly, WCP and BBS maintain the first of two relatives hired should not be counted. (Brief of Pet. 26 n.40.) The nepotism charts take account of this criticism when the relatives work in different years. (Ex. 603-05 (E.R. 65-101); Tr. 2231, 2261.) Even so, halving the nepotistic hires—to 172 white and 1 non-white—would not alter the clear pattern.

<sup>40</sup> WCP and BBS said recruiting for cannery workers in Alaska Native villages and through a largely Filipino local creates the abundance of non-whites in menial jobs. (Brief of Appellees 8 and 29.) But this only means hiring through separate channels has a disparate impact on non-whites. WCP and BBS argued counting re-hires aggravates the statistical picture, since half of the challenged hiring decisions are attributable to a practice of re-hiring incumbents in their old jobs. (*Id.* at 34.) But this is simply to say the practice has a "lock-in" effect in an already segregated job environment. Similarly, WCP and BBS claim the racial imbalance in jobs results from the inability of non-whites to meet the undisputedly subjective qualifications they impose. (*See id.* at 27-28.) But this only means the criteria disqualify non-whites at a higher rate than whites, an observation which virtually defines disparate impact.

brief before this Court, WCP and BBS openly concede the causal links.<sup>41</sup> Yet they argue the Court should disregard their admissions, forcing the employees to show what everyone agrees is true.

First, in any case, the employees offered separate proof of the racial impact of separate hiring channels,<sup>42</sup> although it might have been superfluous, since the causal link "is quite clear." *Domingo*, 727 F.2d 1429, 1436 n.3. They offered separate statistics on the racial impact of nepotism (*See* p. 10-11, *supra*) and re-hire preferences (*see* p. 14, *supra*). They could not offer separate statistics on the disparate impact of subjective qualifications, since: (1) WCP and BBS never identified the criteria they actually applied, leaving qualifications invisible apart from their application through word-of-mouth recruitment; (2) WCP and BBS destroyed applications throughout nearly the entire case period (*see* p. 14, *supra*), so the effects of subjective qualifications and word-of-mouth recruitment could not be separated; and (3) Their personnel records are so sketchy WCP and BBS had to hire a firm to collect background information on their employees through interviews in Alaska just before trial (*see* p. 13 n.14, *supra*), a circumstance which makes regression analysis impractical. Under these conditions, separate statistics were not required. *See Watson*, 108 S. Ct. 2777 (effect of subjective criteria measured through application in interview process). Even so, once DeFrance identified his hypothetical qualifications, the employees showed they had a dis-

<sup>41</sup> WCP and BBS say "the relatively low percentage of non-whites in the at-issue jobs is attributable... [in part] to the 'rehire' practice." (Brief of Pet. 36.) They acknowledge use of separate hiring channels is a cause of job segregation, saying Local 37 is a "'source' [which] produced an over-representation of non-whites in the cannery worker jobs." (*Id.* at 23; *see also id.* at 39.) Similarly, they appear to concede their asserted qualifications have a disparate impact. (*Id.* at 45.)

<sup>42</sup> This includes statistics on the racial mix of Alaska Native villages (Ex. 480; Tr. 2026), stipulations on the race of cannery workers dispatched by Local 37 (J.A. 3-6), statistics on the race of incumbents in each job (*see* p. 4-6, *supra*), admissions on the racial impact of the practices (*see, e.g.,* Ex. 394; Tr. 3121, 3140-41) and anecdotal evidence, such as the testimony of the machinist foreman whose years of word-of-mouth recruitment turned up whites but no non-whites. (J.A. 14-18.)



parate impact.<sup>43</sup> WCP and BBS say the employees claimed other practices—a total of 16—contributed to job segregation (Brief of Pet. 31), but this simply is not true.<sup>44</sup>

Second, WCP and BBS never asserted in their motion to dismiss the employees failed to prove causality. (Tr. 2294-98, 2310-12.) The district court in any case denied the motion, saying “I feel that [plaintiffs] have established a prima facie case”. (Tr. 2313.) When an employer “fails to persuade the district court to dismiss [a Title VII] action for lack of a prima facie case,” the sufficiency of the prima facie case can no longer be challenged either in the trial court or an appellate court. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983) (disparate treatment); *Bazemore*, 478 U.S. 385, 398 (same). Once the employees rested, WCP and BBS offered evidence showing separate hiring channels caused job segregation, re-hire preferences perpetuated the job segregation and DeFrance’s hypothetical qualifications had a disparate impact. (E.g. Tr. 1868-69, 1880-82; see p. 13-14 n. 14, 17, *supra*.) Following trial, they even proposed findings on causality, which the district court adopted. (Defs. Prop. Find. and Concl. 4-6, 31.)

Whether or not in other cases it is “unrealistic to suppose that employers can . . . discover and explain the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces” (*Watson*, 108 S. Ct. 2777, 2787 (O’Connor, J.)), it clearly is not when the employer has already done so. WCP and BBS defended disparate treatment

<sup>43</sup>See p. 13-14, n.14, 17, *supra*. The employee interviews showed disparate impact under the Four Fifth’s rule of the Uniform Guidelines. 29 CFR §1608.4.C; see *Teal*, 457 U.S. 440, 443 n.4.

<sup>44</sup>Besides the practices discussed here: (1) failure to post openings was treated as part of word-of-mouth recruitment; (2) lack of formal promotion procedures highlights the job segregation statistics (see p. 25 and n. 24, *supra*); and the employees challenged (3) discriminatory terminations, (4) pay discrimination, (5) retaliatory discharge, (6) no-fraternization rules and (7) assigning non-whites menial make-work tasks, but all as independent violations, rather than practices which contribute to job segregation. The employees (8) never challenged the English language requirement, because WCP and BBS interrogatory answers showed all or nearly all class members met it. (Ex. 73-75; R.P.O. 132, 136.) The district court observed “this issue is not squarely addressed by the parties.” (App. Cert. I:102.)

claims here “by introduc[ing] evidence showing that [specific] employment practice[s] in fact cause[d] the observed [statistical] disparity,” but in so doing they made the case “ripe for resolution using disparate impact analysis.”<sup>45</sup> If they now complain the courts believed their evidence or accepted their arguments, it is an odd complaint indeed.

Since §703(a)(2) prohibits not just practices which cause job segregation but the segregation itself (42 U.S.C. §2000e-2(a)(2)), separate proof of the causes underlying the statistics should in any case not be required. Beyond this, when it amended Title VII in 1972, Congress stated its intent to reach “complex and pervasive” discrimination, which “[e]xperts familiar with the subject generally describe . . . in terms of ‘systems’ and ‘effects’ . . .”<sup>46</sup> Similarly, it recognized “‘[u]nrelenting broad-scale action against patterns or practices of discrimination’ was essential if the purposes of Title VII were to be achieved.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984). Complex discrimination is not always amenable to easy correlations between cause and effect, so requiring them can defeat this aim. A selection process can be “so poorly defined that no specific criterion can be identified with certainty, let alone be connected to the disparate impact.” *Watson*, 108 S. Ct. 2777, 2797 n.10 (Blackmun, J.). Even relatively well-defined practices overlap, as nepotism and word-of-mouth recruitment do here, making it hard to separate out each’s effects. Sometimes it is “the interaction of two or more components” of a selection

<sup>45</sup>*Segar*, 738 F.2d 1249, 1270; accord *Latinos Unidos De Chelsea v. Secretary of Housing*, 799 F.2d 774, 787 n.22 (1st Cir. 1986); *Lewis*, 773 F.2d 561, 571 n. 16; *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985). The same reasoning applies when an employer counters broad statistics showing disparate impact by showing the disparities were caused by practices which are justified by business necessity. See, e.g., *Green v. USX Corp.*, 843 F.2d 1511, 1524-25 (3rd Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141).

<sup>46</sup>*Teal*, 457 U.S. 440, 447 n.8, quoting S. Rep. 92-415 p. 5 (1971); see also H.R. Rep. No. 92-238 p. 8 (1971). This legislative history is pertinent, since Congress amended §703(a)(2) in 1972 to include the phrase “applicants for employment” and expanded its scope to cover local, state and federal employers. See *Teal*, 457 U.S. 440, 447 n.8; compare *Teamsters*, 431 U.S. 324, 354 n.39 (this legislative history of little value in construing sections unaffected by 1972 amendments).

process which creates the disparate impact. *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985). This is especially true when they interact simultaneously—as do word-of-mouth recruitment and lack of objective criteria—rather than serially. The employee need not always shoulder the burden of proof on causation alone. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 286-87 (1977) (employee need only show constitutionally protected conduct was a “substantial factor” or a “motivating factor” leaving employer to establish “by a preponderance of the evidence” it was not the “cause” of the discharge).

The Uniform Guidelines require each employer with over 100 employees to “maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have . . .” 29 CFR § 1607.4A; see also 29 CFR § 1607.15A(2)(a). “Where a total selection process for a job has an adverse impact, the [employer] should maintain and have available records or other information showing which components have adverse impact.”<sup>47</sup> 29 CFR § 1607.15A(2)(a) (emphasis added). Because the EEOC issued these regulations under an express mandate from Congress,<sup>48</sup> they have the “force of law.” See *United States v. Nixon*, 418 U.S. 683, 695 (1974). While WCP and BBS argue “it is entirely unlikely that [an employer] does or could keep track of the statistical effect” of its practices (Brief of Pet. 35) (emphasis in original), this is exactly what the law requires. When compliance “would result in undue hardship,” the em-

<sup>47</sup>There are abbreviated requirements for employers with fewer than 100 employees (29 CFR § 1607.15A(1)), but they are inapplicable here. (See Ex. 588-90 (E.R. 35-37); Tr. 2231, 2261.) A more general regulation requires employers to keep applications for at least six months. 29 CFR § 1602.14(a). While it exempts seasonal jobs (29 CFR § 1602.14(b)), the exemption does not affect the more specific obligation to keep records showing adverse impact. The previous EEOC Guidelines on Employee Selection Procedures imposed record-keeping obligations like those in the Uniform Guidelines. 29 CFR § 1607.4(a)(1978).

<sup>48</sup>43 F.R. 38, 312 (1978). The EEOC “shall, by regulation, require each employer . . . to maintain such records as are reasonably necessary to carry out the purposes of this title,” “consult[ing] with other interested federal agencies” to “coordinate its requirements with those adopted by such agencies.” 42 U.S.C. § 2000e-8(c) and (d).

ployer may apply to the EEOC or a district court for an exemption (42 U.S.C. § 2000e-8(c)), but there is no evidence WCP or BBS ever did so. Requiring the employee to prove causality when the employer’s record-keeping violations make it impossible rewards the employer for its wrong-doing, when in fact “the wrongdoer [should] bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265 (1946).

## 6. WCP AND BBS HAVE NOT MET THEIR HEAVY BURDEN OF PROVING BUSINESS NECESSITY

When an employee makes a showing of disparate impact, the burden shifts to the employer to prove business necessity. *E.g. Teal*, 457 U.S. 440, 446; *Dothard*, 433 U.S. 321, 329; *Albemarle*, 422 U.S. 405, 425.

The employer’s burden is one of persuasion rather than production, for the Court has twice held evidence which would qualify as an “articulation” in a treatment case fails as proof of business necessity in an impact case. First, in *Griggs*, the employer offered testimony from a vice president to the effect the challenged transfer “requirement[s] were instituted on the Company’s judgment that they generally would improve the overall quality of the work force,” but the Court held it insufficient to establish a “demonstrable relationship to successful performance.” *Griggs*, 401 U.S. 424, 431. Second, in *Albemarle*, the Court held an employer could not meet its burden simply by saying it validated an exam, since,

[N]o record of this validation was made. Plant officials could recall only the barest outlines of the alleged validation. Job relatedness cannot be proved through vague and unsubstantiated hearsay.

*Albemarle*, 422 U.S. 405, 428 n. 23 (emphasis added). Similarly, the Court has repeatedly described the employer’s burden as in essence one of persuasion.<sup>49</sup>

<sup>49</sup>*Teal*, 457 U.S. 440, 446 (“employer must . . . demonstrate that ‘any given requirement [has] a manifest relationship to the employment in question’”); *Albemarle*, 422 U.S. 405, 425 (employer has “burden of proving that its tests are ‘job related’”); *Dothard*, 433 U.S. 321, 329 (employer must “prov[e] that the challenged requirements are job related”); *Griggs*, 401 U.S. 424, 432 (employers has “the burden of showing that any given requirement [has] a manifest relationship to the employment in question”); see *Beazer*, (cont.)



When it amended Title VII in 1972, Congress "recognized and endorsed the disparate impact analysis employed by the Court in *Griggs*," which places the burden of persuasion on business necessity squarely on the employer.<sup>50</sup> Similarly, "[i]n any area where the new law does not address itself" Congress "assumed that the present law"—including *Griggs* (*Teal*, 457 U.S. 440, 447 n.8)—"would continue to govern." 118 Cong. Rec. 7166, 7564 (1972). With this express ratification, altering the burdens would undermine the clear intent of Congress. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986); *Patsy v. Florida Board of Regents*, 457 U.S. 496, 508-09 (1982). The courts of appeals have widely imposed the burden of persuasion of business necessity on employers.<sup>51</sup>

Unlike its disparate impact counterpart, a prima facie case of disparate treatment raises a classic presumption, "requir[ing] the existence" of one fact "to be assumed" from evidence of another until rebutted. J. Weinstein and M. Berger, 1 *Weinstein's Evidence* Para. 300[01] p. 300-1 (1988); see *Burdine*, 450 U.S. 248, 254. The employer's "articulation" is a "negative" defense, "merely controvert[ing] plaintiff's prima facie case." See J. Moore, 2A *Federal Practice* Para. 8.27[4] p. 8-193 (1987). By contrast, the employer's burden of business necessity, is an "affirmative defense," since it "constitut[es] an avoidance" (Fed. R. Civ. Pro. 8(c)) or "raises matter outside the

<sup>49</sup>(cont.) 440 U.S. 568, 587 (prima facie case "rebutted by [employer's] demonstration that its narcotics rule . . . 'is job related' ") (emphasis in each added). The Court has cited with approval court of appeals decisions placing the burden of persuasion on employers (*McDonnell Douglas*, 411 U.S. 792, 802 n.14)—namely, *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) (employer "must come forward with convincing facts establishing a fit between the qualifications and the job"); *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2nd Cir. 1972) (employer bears "a heavy burden of justifying its contested examinations") (emphasis in each added).

<sup>50</sup>*Teal*, 457 U.S. 440, 447 n.8; see also S. Rep. No. 92-415 p. 5 (1971); H.R. Rep. No. 92-238 p. 8 (1971).

<sup>51</sup>E.g. *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 571 (4th Cir. 1985); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 n.3 (5th Cir. 1981), cert. denied, 459 U.S. 967 (1982); but see *Crocker v. Boeing Co. (Vertol Div.)*, 662 F.2d 975, 991 (3rd Cir. 1981).

scope of plaintiff's prima facie case."<sup>52</sup> J. Moore, 2A *Federal Practice* ¶8.27[4] p. 8-193 (1987); accord *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 598 (1983) (White, J.) (employer "bear[s] the burden of proving some 'business necessity' " as "affirmative defense") (Title VI case) (emphasis added). A prima facie case of disparate impact does not make the existence of business necessity more or less likely, so it does not create an inference for the employer to dispel.<sup>53</sup> The impact itself is the violation. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) ("[A] violation of § 703(a)(2) can be established by proof of a discriminatory effect"). Given this, business necessity must be a defense which the employer affirmatively proves.

A party raising an affirmative defense usually bears the burden of persuasion on it (E. Cleary, *McCormick on Evidence* §337 p. 948-49 (3rd Ed. 1984); D. Louisell and C. Mueller, 1 *Federal Evidence*, §66 p. 528 (1977)), a rule which the Court should apply here. Because the employer has superior access to the relevant proof, it is better able to bear this burden. *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2nd Cir. 1972) (employer "has responsibility of designing . . . examinations" so it bears the "heavy burden of justifying" them); see also E. Cleary, *McCormick on Evidence* §337 p. 950 (3rd Ed. 1984); J. Chadbourn, 9 *Wigmore on Evidence* §2486 p. 290 (1981). "Policy" and "fairness" dictate the same result. See *Keyes v. School District No. 1*, 413 U.S. 189, 209-10 (1973); E. Cleary, *McCormick on Evidence* §337 p. 952 (3rd Ed. 1984). Since a prima facie showing of disparate treatment in a non-statistical case is "not onerous" (*Burdine*, 450 U.S. 248, 253), the employer bears only the light "articulation" burden as rebuttal. Because a prima facie case of disparate impact usually involves

<sup>52</sup>The related BFOQ showing of "reasonable necessity" is also an affirmative defense. See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 408-09 n. 10, 413-17 (1985) (ADEA case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (same).

<sup>53</sup>Fed. R. Evid. 301 is irrelevant, since it "merely defines the term 'persuasion,'" but "in no way restricts the authority of a court . . . to change the customary burdens of persuasion in a manner that otherwise would be permissible." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983).



a showing of systematic effects (see *Watson*, 108 S.Ct. 2777, 2789 n.3), the employer's rebuttal burden increases accordingly.<sup>54</sup>

However suggestive, the plurality opinion in *Watson* does not compel a different result. Saying the ultimate burden of proof cannot be shifted to the employer (*Watson*, 108 S. Ct. 2777, 2790) (O'Connor, J.) does not relieve the employer of the burden of persuasion on an affirmative defense.<sup>55</sup> Nor does permitting an employee to "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest" (*ibid.*) suggest anything contrary, for it simply gives the employee a chance to resist the affirmative defense by showing the challenged practice is not really necessary.<sup>56</sup>

Under *Griggs*, "[t]he touchstone [of an employer's defense to a showing of disparate impact] is business necessity." *Griggs*, 401 U.S. 424, 431. This defense triggers a "more probing judicial review of, and less deference to, the seemingly reasonable acts" of employers than does the rebuttal to a showing of

<sup>54</sup>*Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 572 (4th Cir. 1985); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983). *Vuyanich v. Republic National Bank*, 521 F. Supp. 656, 661 (N.D. Tex. 1981), vacated and remanded on other grounds, 723 F.2d 1195 (5th Cir. 1984), cert. denied, 469 U.S. 1073 (1984). A statistical showing of even disparate treatment forces from the employer a more exacting rebuttal than a mere "articulation." *Segar*, 738 F. 2d 1249, 1268-70; see also *Teamsters*, 431 U.S. 324, 342-43 n. 24 (affirmation of "best qualified" hiring insufficient to meet proof of "systematic exclusion"); cf. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (burden does not shift when evidence of discrimination is direct).

<sup>55</sup>See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-01 (1983) (statute placing on NLRB's General Counsel "burden of proving the elements of an unfair labor practice" is consistent with rule placing on the employer "affirmative defense" of proving "by a preponderance of the evidence" its actions would have been the same "regardless of [its] forbidden motivation"); see also *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408-09 n. 10 (1985) (placing burden of proving BFOQ on employer as affirmative defense consistent with leaving burden of persuasion on disparate treatment on employee).

<sup>56</sup>An employee wishing to pursue disparate treatment claims may also show pretext at this stage (see *Teal*, 457 U.S. 440, 447; *Albemarle*, 422 U.S. 405, 436), for "[e]ither [the disparate impact or the disparate treatment] theory may... be applied to a particular set of facts." *Teamsters*, 431 U.S. 324, 336 n.15.

disparate treatment. *Washington v. Davis*, 426 U.S. 229, 247 (1976); see also *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985) ("under a 'rational basis' standard" a court "might well consider that its 'inquiry is at an end' with an expert witness' articulation of any 'plausible reaso[n]' for the employer's decision") (construing BFOQ defense of reasonable necessity in ADEA case). Proving it entails showing "a discriminatory practice" is "necessary to safe and efficient job performance". *Dothard*, 433 U.S. 321, 332 n.14; see also *Satty*, 434 U.S. 136, 143 (employer must show "company's business necessities" the challenged policy).

*Griggs* accepts the alternative showing of "job relatedness" through validation under EEOC Guidelines, since the regulations serve the same purpose of limiting deference to the employer's belief in the reasonableness of its own practices. See *Griggs*, 401 U.S. 424, 433 n.9. Following *Griggs*, *Albemarle* "clarified" the "appropriate standard of proof for job relatedness," holding a "validation study [was] materially defective" when "[m]easured against the [then current EEOC] Guidelines," which were "entitled to great deference" as "[t]he administrative interpretation of the Act by the enforcing agency." *Albemarle*, 422 U.S. 405, 431-436; see also *Teal*, 457 U.S. 440, 445, 446 (test must be "shown to be job related" through evidence it "[has] a manifest relationship to the employment in question"). Since *Griggs*, the Court has with reasonable consistency required employers to show a practice with disparate impact is either (1) "necessary to safe and efficient job performance" (*Dothard*, 433 U.S. 321, 332 n.14); or (2) "job related" under prevailing validation standards in EEOC Guidelines.<sup>57</sup> When it amended Title VII in 1972, Congress ratified *Griggs*, citing the employer's need to show "overriding business

<sup>57</sup>Only *Beazer* might be read to depart from these requirements. *Beazer*, 440 U.S. 568, 587 n.31 (even absent validation, business necessity is shown where safety and efficiency are "significantly served by—even if they do not require" challenged practice). But to the degree it does, it also strays from the expressed will of Congress. *Washington* was not a Title VII case. While it might have applied "standards similar to those obtaining under Title VII" (*Washington*, 426 U.S. 229, 249), it apparently did not apply Title VII standards *per se*.

necessity" or an "overriding reason why [the] tests [with disparate impact] were necessary." H. Rep. No. 92-238 p. 21-22 (1971).

The district court never expressly ruled on the business necessity of separate hiring channels. Nor would the observations it made support a finding of business necessity.<sup>58</sup> Literally without a whisper of evidence, the district court said it "would be required"—if faced with a *prima facie* case—"to find business necessity for . . . rehire" preferences. (App. Cert. I:121-33.) But when—as here—an employer "produce[s] no evidence correlating" a criterion with "good job performance" or otherwise "fail[s] to offer evidence . . . in specific justification of it," there is no basis for such a finding. *Dothard*, 433 U.S. 321, 331; *Satty*, 434 U.S. 136, 143. Here, in fact, there is evidence showing the rehire preferences actually undermine "best qualified" hiring.<sup>59</sup> The failure of WCP and BBS to identify criteria

<sup>58</sup>The district court wrote "[i]t is not a reasonable business practice to scour . . . sparsely populated, remote regions [in Alaska] for skilled and experienced workers." (App. Cert. I:32.) But it took the observation verbatim from testimony of WCP's president (Tr. 1125), who offered it "without meaningful study of [the practice's] relationship to job-performance ability" (*Griggs*, 401 U.S. 424, 431). The observation is not cast in business necessity terms. It does not explain the failure to recruit non-whites from the Lower 48 for upper-level jobs or in Alaska Native villages for unskilled or low-skill jobs in largely white departments. Nor does it say why—without "scouring" remote areas—it is impractical to give Alaska Natives already recruited for menial jobs a chance to bid on desirable jobs.

<sup>59</sup>The preferences require WCP and BBS to re-hire past incumbents, even when better candidates surface. WCP and BBS hired whites who could not meet minimum qualifications the district court endorsed. (See p. 13 n.15, *supra*.) They also gave preference to relatives without regard to merit. (See p. 38, *supra*.) Under these circumstances, re-hire preferences simply perpetuate past mistakes. *Grant*, 635 F.2d 1007, 1018-19.

Both courts below applied the disparate impact analysis, since the re-hire preferences do not comprise a seniority system. WCP and BBS conceded in no fewer than twenty-one interrogatory answers they had no seniority system. (Ex. 113-132; R.P.O. 132, 138-40.) The essence of a seniority system is the "allot[ment] to employees of ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980). But the re-hire preferences here are not based on length of service, only the fact of service, for they give any two employees who worked in a job the preceeding season precisely the same right to return—even though one worked a single day and the other worked twenty years. (See Ex. A-1 through A-11; Tr. 2345-46.)

actually applied precludes a finding their qualifications were justified by a business necessity. *Rath*, 787 F.2d 318, 328. DeFrance openly admitted he did not validate even his hypothetical qualifications under EEOC Guidelines. (J.A. 470.) No business necessity justification was offered for nepotism. (See p. 38, *supra*.) Nor did WCP and BBS offer a particularized showing which would justify a finding of business necessity for their housing practices.<sup>60</sup> See *Domingo v. Nefco*, 445 F. Supp. 421, 439-40. The only justification they provided for their messing practices was legally insufficient. (See p. 36 n.36, *supra*.)

## 7. THE COURT SHOULD ALSO AFFIRM ON ALTERNATE GROUNDS OF DISPARATE TREATMENT

The district court ruled the employees made a *prima facie* case of disparate treatment in skilled jobs, unskilled jobs, housing and messing (App. Cert. I:114, I:118-19), so the sufficiency of the *prima facie* case is no longer at issue. *Aikens*, 460 U.S. 711, 714-15; *Bazemore*, 440 U.S. 385, 398. Since the challenged practices—including segregated hiring channels coupled with express race-labelling of jobs and bunkhouses—are facially discriminatory (*Domingo*, 727 F.2d 1429, 1436), the shifting burden analysis doesn't apply. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1981). But even if it did, Dr. Rees—the labor economist for WCP and BBS—drew the inference of discrimination in certain upper-level jobs, even after adjusting for defense contentions on skills, labor market and the propriety of separate hiring channels. For these jobs, WCP and BBS failed to rebut the *prima facie* case. See *Burdine*, 450 U.S. 248, 254. The labor market showing WCP and BBS offered for other jobs was legally insufficient, since under *Teamsters*, hiring area statistics will not rebut a disparate treatment showing based on job segregation statistics. *Teamsters*, 431 U.S. 324, 342 n.23. Even so, the reasons WCP and BBS offered for statistical disparities were clear pretext, for they were based on qualifications prepared for litigation and misreadings of their labor contracts. See *Domingo*, 727 F.2d 1429,

<sup>60</sup>Nearly every cannery superintendent who testified on the issue said workers housed in the same bunkhouse had different call-out times. (J.A. 8-12, 227-28, 230-35.) Employees who arrived for pre-season work often changed bunkhouses when the season started. (J.A. 235.)



1436. Finally, since the same individuals were responsible for hiring, housing and messing practices (App. Cert. I:37), a reversal on disparate treatment claims in hiring would necessitate a reversal on such claims in housing and messing.<sup>61</sup> *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 338 (4th Cir. 1983), cert. denied, 466 U.S. 951 (1984).

### CONCLUSION

The Court should affirm on all disparate impact claims, except re-hire preferences, as to which it should reverse the finding of business necessity. Alternatively, the Court should affirm claims of discrimination in jobs, housing and messing on disparate treatment grounds.

Respectfully submitted,

Abraham A. Arditi\*

Bobbe Jean Bridge

\*Counsel of Record

<sup>61</sup> Affirming on disparate treatment grounds under 42 U.S.C. § 1981 would affect claims involving Ekuk and Alitak canneries. (See p. 1 n. 1 and p. 8 n. 10.)

### APPENDIX A-1

TABLE F\*

#### HIRING IN JOB DEPARTMENTS BY RACE AT BUMBLE BEE CANNERY 1971-80

Job Department	Number of Positions By Race		Percentage By Race	
	W	NW	%W	%NW
Administrative	3	1	75%	25%
Machinist	144	0	100%	0%
Company Fishing Boat	160	0	100%	0%
Tender	136	3	98%	2%
Carpenter	86	2	98%	2%
Beach Gang	49	3	94%	6%
Clerical	39	4	91%	9%
Quality Control	8	4	67%	33%
Miscellaneous	107	8	93%	7%
Culinary	112	56	67%	33%
Laborer	72	38	65%	35%
Cannery Worker	501	719	41%	59%
TOTAL	1417	838	63%	37%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

\*This table is a verbatim reproduction of Exhibit 588 (E.R. 35), which was offered at trial by the employees. (Tr. 2231, 2261.)



## APPENDIX A-2

TABLE G\*

HIRING IN JOB DEPARTMENTS BY RACE  
AT RED SALMON CANNERY 1971-80

Job Department	Number of Positions By Race		Percentage By Race	
	W	NW	%W	%NW
Administrative	4	0	100%	0%
Machinist	117	7	94%	6%
Company Fishing Boat	152	33	82%	18%
Tender	219	2	99%	1%
Carpenter	32	0	100%	0%
Beach Gang	60	16	79%	21%
Clerical	30	4	88%	12%
Quality Control	3	0	100%	0%
Miscellaneous	107	42	72%	28%
Culinary	131	35	79%	21%
Laborer	68	154	31%	69%
Cannery Worker	180	413	30%	70%
TOTAL	1103	707	61%	39%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

\*This table is a verbatim reproduction of Exhibit 589 (E.R. 36), which was offered at trial by the employees. (Tr. 2231, 2261.)

## APPENDIX A-3

TABLE H\*

HIRING IN JOB DEPARTMENTS BY RACE  
AT WARDS COVE CANNERY 1971-80

Job Department	Number of Positions By Race		Percentage By Race	
	W	NW	%W	%NW
Administrative	2	0	100%	0%
Machinist	102	1	99%	1%
Tender	403	13	97%	3%
Clerical	25	1	93%	7%
Quality Control	9	0	100%	0%
Miscellaneous	54	1	98%	2%
Beach Gang	0	1	0%	100%
Culinary	40	41	49%	51%
Laborer	3	0	100%	0%
Cannery Worker	874	517	63%	37%
TOTAL	1512	576	72%	28%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

\*This table is a verbatim reproduction of Exhibit 590 (E.R. 37), which was offered at trial by the employees. (Tr. 2231, 2261.)

## APPENDIX B-1

**SUMMARY OF STATISTICAL TESTS FOR CASE  
NEW SEASONAL HIRES, 1971-80  
SOUTH NAKNEK [BUMBLE BEE] ONLY**

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	52	90.385
CARPENTER	53	98.113
CULINARY	28	85.714
FISHERMAN	70	100.000
MACHINIST	76	100.000
MEDICAL	6	83.333
OFFICE	7	85.714
RADIO	1	0.000
STOR/STCK	6	100.000
TENDER	78	94.872
CANNERY	767	47.718
LABORER	77	70.130
CANRY/LAB	844	49.763
AT ISSUE	536	84.142
GEN. SKILL	159	57.233
ALL JOBS	1380	63.116

\*This table is an extract of Exhibit A-278 Table 4 SN (E.R. 4), which was offered at trial by the employers. (Tr. 2646-47.)

**B-2****APPENDIX B-2**

**SUMMARY OF STATISTICAL TESTS FOR CASE  
NEW SEASONAL HIRES, 1971-80  
RED SALMON ONLY**

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	41	78.049
CARPENTER	3	100.000
CULINARY	24	79.167
FISHERMAN	35	94.286
MACHINIST	29	79.310
MEDICAL	3	100.000
OFFICE	5	80.000
RADIO	3	100.000
STOR/STCK	0	0.000
TENDER	108	96.296
CANNERY	338	35.799
LABORER	163	34.356
CANRY/LAB	501	35.329
AT ISSUE	391	81.841
GEN. SKILL	140	68.571
ALL JOBS	892	55.717

\*This table is an extract of Exhibit A-278 Table 4 RS (E.R. 3), which was offered at trial by the employers. (Tr. 2646-47.)

**B-3****APPENDIX B-3**

**SUMMARY OF STATISTICAL TESTS FOR CASE  
NEW SEASONAL HIRES, 1971-80  
WARDS COVE ONLY**

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	1	0.000
CARPENTER	0	0.000
CULINARY	19	47.368
FISHERMAN	4	100.000
MACHINIST	28	100.000
MEDICAL	0	0.000
OFFICE	7	100.000
RADIO	0	0.000
STOR/STCK	0	0.000
TENDER	188	94.681
CANNERY	834	68.585
LABORER	3	100.000
CANRY/LAB	837	68.698
AT ISSUE	318	89.623
GEN. SKILL	71	83.099
ALL JOBS	1155	74.459

\*This table is an extract of Exhibit A-278 Table 4 WC (E.R. 2), which was offered at trial by the employers. (Tr. 2646-47.)



## APPENDIX C

John Connor, office manager at Bumble Bee, referred to non-resident cannery workers as "the filipinos" and suggested a bookkeeping entry of "150-3 Filipinos adv." (Ex. 341; R.P.O. 15, 132, 150.) John Lum, who succeeded him, identified certain employees as "Japanese" and "Local 46 (natives.))" (Ex. 338; R.P.O. 15, 132, 150; J.A. 614.) Myrtle Hjorten, secretary at Bumble Bee, referred to non-resident cannery workers as "the Filipinos" and "10 Filipinos." (Ex. 400, 408; R.P.O. 15, 132, 154-55; Tr. 939.) Bumble Bee records refer to employees as "Filipinos," "Philipinos," "Natives" and "Eskimos" (Ex. 358, 736-37, 740; R.P.O. 132, 151; Tr. 2034-35, 2279); and classify employees as "Native Cook," "Native Galley," "Native Galley Cook," "Natives," "Filipinos," "Filipino," "Cannery Workers-Filipino," "Cannery Workers-Native," "Native cannery workers," "Filipino cannery crew," "Filipino, Eskimo, Women," "Egg Department-Girls, [Egg Department] Fils, [Egg Department] Eskimos," "Women cannery workers," "Filipino [cannery workers], Native cannery [workers]," "Cannery workers: Women, Other, Native, Filipino." (Ex. 342-53, 358, 483, 737, 750; R.P.O. 132, 150-57; Tr. 2034-35, 2279.)

The storekeeper at Bumble Bee referred to cannery worker bunkhouses as "Philippino Bunk H," "Phelipino Bunk House" and "Native Bunk House." (Ex. 330-37; R.P.O. 132, 150.) Bumble Bee records mention the "Filipino bunkhouse," "Native bunkhouse" and "Native Bunk H." (Ex. 339, 735; R.P.O. 132, 150; Tr. 2279.) Supervisors at Bumble Bee referred to bunkhouses as "Native bunkhouse" and "Filipino bunkhouse," terms which are in common usage around the cannery. (J.A. 31-34.)

Hardy Parrish, who worked in the WCP home office, referred to resident cannery workers as "the native boys," "24 Eskimos," "the natives" and "the Eskimo cannery workers" (Ex. 368, 370-71, 413, 416, 543; R.P.O. 132, 152, 155; J.A. 105-108); hiring resident cannery workers as the "Native cannery worker situation" and "the Native situation" (Ex. 367, 369; R.P.O. 132, 152); non-resident cannery workers as "9 Fils," "34 fils," "72 Fils," "20 Filipinos," "the Filipinoes," "our group of Fils," "two Filipinos," "13 Filipino," "68 Filipinos," "29 Filipinos," "the filipinos," "the Filipinos," "Fils," "the Phils," "Fil-

ipinoes," "your Filipino crew" and "four Filipinos" (Ex. 355-357, 362, 378, 384, 386, 409, 410, 421A, 494, 500, 511, 513, 515, 518, 519; R.P.O. 132, 151-53, 155-56; Tr. 2279); cooks for the non-resident cannery workers as "your Fil cook" and the "Filipino cook" (Ex. 403, 424, 741; R.P.O. 132, 154, 156; Tr. 2279); and other employees as "the colored fellow," "the 2 Samoans," "the 4 natives for Verns crew," "4 of the natives" and "the 4 Eskimo fellows" (Ex. 373, 374, 377, 398, 415; R.P.O. 132, 152-55).

Don Ballard, office manager at Red Salmon, referred to non-resident cannery workers as "the Fils" and "the Phils" (Ex. 354, 363, 396, 417, 498; R.P.O. 15, 132, 151, 154-55); and Local 37, ILWU as "the Fil union" (Ex. 499; Tr. 2279); resident cannery workers as "24 Eskimos" and "the 24 natives Cannery Workers" (Ex. 418, 454; R.P.O. 132, 155; Tr. 2022-23); and certain employees as "four of the natives" and the "natives" (Ex. 372, 374; R.P.O. 132, 152-54). Similarly, Ballard wrote to the home office,

Hardy, could you check with Mayflower press about those little square preprinted cards for the buttons. We should have had them up here before now, we got 24 Eskimos in yesterday and I would like to get these things made up so I know who they are and also to keep the other bums out of the Mess Hall.

(App. Cert. I:80; R.P.O. 15.)

Forms at Red Salmon cannery contain a blank for the race of each employee, which is often recorded. (Ex. 520, 523-25; Tr. 2279.)

Management at Red Salmon referred to the "Eskimo bunkhouse," "Native bunkhouse," "Filipino bunkhouse" and "Filipino messhall and bunkhouse." (Ex. 84; Dep. Lessley p. 12-15.) Don Ballard, office manager at Red Salmon, referred to the "Fils bathhouse." (Ex. 354.)

Joseph Brindle, superintendent at Wards Cove, referred to non-resident cannery workers as "the Filipino[s]." (Ex. 422; R.P.O. 16, 132, 156.) Harold Brindle, an officer of WCP, referred to labor agreements for resident cannery workers as "the Eskimo agreements." (Ex. 487; Tr. 2279, 2765.) Personnel at the WCP home office spoke of the "Filipino crews," "native crews" and "Eskimo crew." (Dep. Parrish p. 65.)

Joseph Brindle, superintendent at Wards Cove, referred to the "Filipino [bunkhouse roof] ridge" and "the Japanese bedroom." (Ex. 405; R.P.O. 16, 132, 154.) Gerald Steele, office manager at Wards Cove, referred to "the Filipino house." (Ex. 404; R.P.O. 132, 154; Tr. 81.) Other cannery records referred to the "Filipino house," "Japanese Apts," "Filipino Bunk House," "White Bunkhouse," "Japanese Bunkhouse" and "Filipino Bunkhouse." (Ex. 379, 401, 402, 450; R.P.O. 132, 153-54.)

Personnel records at Wards Cove refer to the "Native Crew of 1971" (Ex. 375; R.P.O. 132, 153); classify the egg crew workers as "Supervisor," "Orientals," "Girls," "Egg Department-Girls," "Egg Department-Fils," and "Egg Department-Eskimos" (Ex. 358, 509; R.P.O. 132, 151; Tr. 2279); and categorize cannery workers as "Misc. cannery workers," "Filipino's," "Eskimo's" and "Female" (Ex. 358; R.P.O. 132, 151).

## APPENDIX D

DeFrance's "ability to" criteria include:

"[A]bility to use mechanic's hand tools," "ability to use seam micrometers [and] gauges," "ability to understand mechanical drawings," "ability to use . . . pipefitter's tools," "[m]ust be able to understand and accurately complete required inspection and report forms," "ability to check weights, record temperatures, and use basic mathematics through decimals" and "ability to accurately operate ten-key calculator." (J.A. 500-07.)

DeFrance's subjective qualifications include:

"[A]bility to work with minimum supervision," "[m]ust possess leadership skills," "[a]bility . . . to communicate effectively in English," "ability to handle the strain, responsibility and pressure," "capable of training a machinist helper-trainee," "mechanical ability," "[m]ust be flexible, willing to learn, and [able] to follow directions," "[m]ust have ability to handle details," "be reliable," "[r]equires good health," "ability to perform heavy work out of doors," "be honest," "ability to live in small quarters and function as an effective member of a small group" and "ability to work long hours on ocean-going vessel." (J.A. 500-07.)

Subjective qualifications cited by lay witnesses include:

"[A] good worker," "somebody that's sober," "somebody that's reliable," "good people," "[people who] want to work," "[a]bility plus hands, head," "family background," "good guy," "gets along with everybody," "motivated to do this kind of work," "people that we were sure you could depend on to stay on the job," "[people who are] capable," "we tried to stay away from drinkers," "not a dirty person" and "personality." (Dep. of A.W. Brindle-1975 29; Dep. Leonardo-1975 22; Dep. Leonardo-1978 47; Dep. W.F. Brindle-1978 68-69; Dep. H. Parrish 18; Dep. Rohrer 43; Dep. Mullis 12.)



FOR ARGUMENT

No. 87-1387

Supreme Court, U.S.

FILED

DEC 5 1988

JOSEPH F. SPANOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

**REPLY BRIEF OF PETITIONERS**

Douglas M. Fryer\*  
Douglas M. Duncan  
Richard L. Phillips  
MIKKELBORG, BROZ,  
WELLS & FRYER  
Suite 3300  
1001 Fourth Avenue Plaza  
Seattle, Washington 98154  
(206) 623-5890

\* Counsel of Record

*Attorneys for Petitioners*

December 5, 1988

## TABLE OF CONTENTS

	<u>Page</u>
Reply to Respondents' Statement of Facts .....	1
1. Hiring Practices .....	2
A. Hiring for At-Issue Jobs .....	2
B. Local 37 .....	3
C. The "Lock-In" Argument .....	4
D. Hiring in Alaska .....	5
E. Labeling .....	6
2. Labor Supply .....	7
3. Skills .....	8
4. Nepotism .....	10
5. Housing and Messing .....	11
Argument in Reply .....	12
I. Proof of Work Force Imbalance Is Not and Should Not Be Dispositive Proof of Disparate Impact. ....	12
A. Work Force Imbalance is Not <i>Per Se</i> Discriminatory. ....	12
B. Policy Considerations Strongly Disfavor Internal Comparisons .....	14
C. Instances of Statistical Significance .....	15

## TABLE OF CONTENTS, (continued)

	<u>Page</u>
II. The Causation Gap .....	16
III. Respondents' Proof Does Not Establish an Unrebuttable Presumption .....	16
Conclusion .....	20
Appendices:	
Appendix I: Percentage of New Hires From Washington, Oregon, and Alaska: All Alaska Facilities of Defendants, Except Icy Cape .....	A-1
Appendix II: White Percentage of Civilian Labor Force Over Age 18 From Farwest States .....	A-2
Appendix III: Number and Percentage of White and Minority Components of Civilian Labor Force in Farwest Needed to Produce 5,000 Employees Per Year for Salmon Industry .....	A-3
Appendix IV: Instances of Statistically Significant Underrepresentation of Nonwhites in At-Issue Jobs in Petitioners' Labor Market Analysis .....	A-5

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	16
<i>Allen v. Prince George's County, Md.</i> , 737 F.2d 1299 (4th Cir. 1984) .....	15
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) .....	1
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986) .....	14
<i>Carpenter v. Stephen F. Austin State Univ.</i> , 706 F.2d 608 (5th Cir. 1983) .....	13
<i>Christie v. Callahan</i> , 124 F.2d 825 (D.C. Cir. 1941) .....	17
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	13,16
<i>Domingo v. New England Fish Co.</i> , 445 F. Supp. 421 (W.D. Wash. 1977), <i>rev'd on other issues</i> , 727 F.2d 1429, <i>modified</i> 742 F.2d 520 (9th Cir.) (1984) .....	7,14
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	16
<i>EEOC v. Federal Reserve Bank of Richmond</i> , 698 F.2d 633 (4th Cir. 1983), <i>rev'd on other grounds sub nom</i> <i>Cooper v. Federal Reserve Bank of Richmond</i> , 467 U.S. 867 (1984) .....	15
<i>EEOC v. Sears, Roebuck &amp; Co.</i> , 839 F.2d 302 (7th Cir. 1988) .....	12,16
<i>EEOC v. Western Elec. Co.</i> , 713 F.2d 1011 (4th Cir. 1983) .....	15



## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	Page
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) . . . . .	13
<i>Gay v. Waiters' &amp; Dairy Lunchmen's Union, Local No. 30</i> , 694 F.2d 531 (9th Cir. 1982) . . . . .	15
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976) . . . . .	18
<i>Green v. USX Corp.</i> , 843 F.2d 1511 (3d Cir. 1988), petition for cert. filed July 23, 1988, No. 88-141 . . . . .	19
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) . . . . .	16,17,18,19
<i>Hester v. Southern Railway Co.</i> , 497 F.2d 1374 (5th Cir. 1974) . . . . .	9
<i>James v. Stockham Valves &amp; Fittings Co.</i> , 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978) . . . . .	13
<i>Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.</i> , [1942] A.C. 154 . . . . .	18
<i>Markey v. Tenneco Oil Co.</i> , 635 F.2d 497 (5th Cir. 1981) . . . . .	14
<i>Markey v. Tenneco Oil Co.</i> , 707 F.2d 172 (5th Cir. 1983) (after remand) . . . . .	14,15
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) . . . . .	17
<i>New York Transit Auth. v. Beazer</i> , 440 U.S. 568 (1979) . . . . .	13-14,18
<i>NLRB v. Transp. Management Corp.</i> , 462 U.S. 393 (1983) . . . . .	17

## TABLE OF AUTHORITIES, (continued)

Cases, (continued)	Page
<i>Paxton v. Union Nat'l Bank</i> , 688 F.2d 552 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983) . . . . .	13
<i>Payne v. Travenol Laboratories, Inc.</i> , 673 F.2d 798 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982) . . . . .	13
<i>Petition of New England Fish Company</i> , 465 F. Supp. 1003 (W.D. Wash. 1979) . . . . .	9
<i>Rivera v. City of Wichita Falls</i> , 665 F.2d 531 (5th Cir. 1982) . . . . .	13
<i>Ste. Marie v. Eastern R.R. Ass'n</i> , 650 F.2d 395 (2d Cir. 1981) . . . . .	9
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) . . . . .	14
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) . . . . .	17
<i>Watson v. Ft. Worth Bank &amp; Trust</i> , 487 U.S.____, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) . . . . .	12,20
<i>Weissinger v. United States</i> , 423 F.2d 795 (5th Cir. 1970) . . . . .	19
<i>Williams v. Owens Illinois, Inc.</i> , 665 F.2d 918 (9th Cir. 1982) . . . . .	14
<i>Wright v. Rockefeller</i> , 376 U.S. 52 (1964) . . . . .	17

## TABLE OF AUTHORITIES, (continued)

Statutes & Regulations	<u>Page</u>
42 U.S.C. § 2000e <i>et seq.</i> , Civil Rights Act of 1964 . . . . .	12
43 U.S.C. § 1601 <i>et seq.</i> , Alaska Native Claims Settlement Act, 85 Stat. 688 (1986) . . . . .	7
29 C.F.R. 1602.14(b) . . . . .	18
Other Authorities	
W. Blackstone, 3 <i>Commentaries</i> * 340 (1900) . . . . .	18
Scanlan, <i>Illusions of Job Segregation</i> , 93 <i>The Public Interest</i> 54 (1988) . . . . .	14
E. Cleary, <i>McCormick on Evidence</i> § 337 (3d ed. 1984) . . . . .	18
J. Moore, 5 <i>Federal Practice</i> ¶ 41.13(4), p. 41-179 (2d ed. 1988) . . . . .	19
J. Buzzard, 10 <i>Phipson on Evidence</i> , p. 36 (12th ed. 1976) . . . . .	18
Cleary, <i>Presuming and Pleading: An Essay on Juristic Immaturity</i> , 12 <i>Stan. L. Rev.</i> 5, 7 (1959) . . . . .	17
<i>Manual for Complex Litigation</i> (2d ed. 1986) . . . . .	19

IN THE  
Supreme Court of the United States

October Term, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,  
*Respondents.*

REPLY BRIEF OF PETITIONERS

Respondents' brief is dominated by two recurring themes: a refusal to acknowledge or appreciate the District Court's fact-finding role and a disregard of the principles used to measure disparate impact. Respondents opt, instead, for an exhaustive re-argument of the facts as if the clearly erroneous rule did not exist and they assume that mere proof of imbalance in an employer's work force establishes an un rebuttable case of disparate impact.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents' densely packed brief presents a misleading factual picture. To avoid the heavy burden placed on them under the clearly erroneous rule,<sup>1</sup> respondents simply ignore the findings and point only to evidence favorable to their case. This case is before this Court, however, not on a review of a summary judgment but after a trial has been conducted.

<sup>1</sup> *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Respondents do state there was no evidence that rehiring a satisfactory worker in the same job the next season was necessary. Resp. Br., p. 14. Not even the Ninth Circuit agreed with respondents on this. Pet. App. III:56, VI:32, 33.

The superficial appeal of respondents' evidence was found collectively by the District Court to provide an inference of intentional discrimination. That inference disappeared when the court considered petitioners' evidence. The error of the Court of Appeals occurred when it considered this same inference created an un rebuttable presumption if the impact model were used. Pet. App. VI:18.

### 1. Hiring Practices.

Respondents persistently mischaracterize the practices as "racially segregated."<sup>2</sup> The label does not make it a fact. The trial court found the practices were not racially motivated, were not a pretext for intentional discrimination, and the Ninth Circuit affirmed on this issue.<sup>3</sup> While respondents continue to insinuate that petitioners used Local 37 out of racial motivation, they lost that argument in both courts below.

#### A. Hiring for At-Issue Jobs.

Respondents do not dispute that petitioners hired many nonwhites in at-issue jobs — including at the highest levels.<sup>4</sup> Petitioners collectively employed 24% nonwhites in these at-issue jobs. Respondents concede the relevance of these hiring results. (Resp. Br., p. 8, n. 10.)

<sup>2</sup> The term "segregate" conjures visions of racial patterns in the southern United States. It simply does not apply to petitioners. Being unfamiliar with the record, the *amicus* briefs in support of respondents are infected with the same rhetoric.

<sup>3</sup> Pet. App. I:119, 129, 130. Moreover, this Court denied respondents' Petition for Writ of Certiorari (No. 87-1388) on this issue and denied their Motion for Rehearing. Those rulings should not be disturbed.

<sup>4</sup> E.R. 13 (790 nonwhite hires); R.T. 2862; J.A. 159 (director, vice president, superintendent).

Respondents' real argument is that petitioners should have hired 50% minorities in at-issue jobs and should have either targeted Local 37 as a source for these jobs and/or trained people for at-issue jobs.

#### B. Local 37.

Petitioners used Local 37 as a source of nonresident cannery workers simply because it held the contract. R.T. 1128. Respondents now contend that the union has no formal role in selecting employees. The facts and the findings are otherwise. The cannery worker foreman<sup>5</sup> first determines who has a rehire preference, and the remaining employees (except for egg house workers)<sup>6</sup> are designated by the union president. R.T. 1127, 1128.

None of the respondents were channeled by management into cannery worker jobs. Rather, each testified that he originally went to Local 37 to seek employment in the canneries.<sup>7</sup> The District Court found that management does not direct any cannery worker foremen to line up members of any race. (Pet. App. 1:33.)<sup>8</sup> Respondents do not mention these important findings.

<sup>5</sup> While the union contract does state the cannery worker foreman is a company representative (see Local 37 contract in Ex. A-1 through A-11), Dr. Rees explained that this is a common provision in union contracts to avoid Taft-Hartley implications; that the person named on management payroll was acceptable to the union; and that his decisions were agreeable to the union. R.T. 1967, 1968.

<sup>6</sup> Some of the egg house workers are hired by management because of the union's refusal to fill those positions. Perhaps as a carry-over from World War II, the Filipino males refuse to work in the egg house with Japanese nationals without payment of overtime. R.T. 1128.

<sup>7</sup> R.T. 46 (Kido); R.T. 76 (Atonio); R.T. 874 (Bacilig); R.T. 956 (C. Lew); R.T. 205 (Kuramoto); R.T. 1042 (Arruiza); R.T. 1057 (R. del Fierro); R.T. 2222 (A. Lew). See R.T. 160 (Della); R.T. 202 (Pascua); R.T. 795 (Daba) (class member witnesses).

<sup>8</sup> Petitioners cite a letter from the Alitak cannery worker foreman Fred Wong (Ex. 394), who said he could recruit whites or blacks if directed. Wong was concerned because of this suit that Local 37 would supply too many Asians. (R.T. 3122.) In line with company policy, he was never directed to do so and the District Court so found. Pet. App. I:33.



### C. The "Lock-In" Argument.

Respondents contend that cannery workers are locked in or tainted by the fact that they are hired as cannery workers. They imply that cannery workers are cut off from other jobs. However, at the end of the season all employees complete their jobs and become part of the overall labor supply available for at-issue jobs. The District Court found that none were deterred, that all applicants were evaluated on job-related criteria, that employees and non-employees are free to apply for any job and that similarly situated applicants are treated equally.<sup>9</sup> Many did apply, including respondent Atonio, and were hired.<sup>10</sup> The statement "What's wrong with being in the Filipino crew?" quoted by respondents (Resp. Br. 15) was flatly denied by its alleged author. (R.T. 2816.) Respondents also do not mention the finding that there has been a general lack of interest by cannery workers in applying for non-cannery worker jobs. (Pet. App. I:40.)

There are also substantial business reasons why petitioners do not promote during the season, and the finding (and supporting evidence) that there is a lack of time to train during the season is unchallenged. (Pet. App. I:19, 34, 46.) Thus, it is clear that both by necessity and by choice these employers do not promote from within.<sup>11</sup>

<sup>9</sup> Pet. App. I:33, 122, 123.

<sup>10</sup> Filipinos and other minorities are not "channeled" into Local 37 cannery worker jobs. Those who actually apply for at-issue jobs are hired in those jobs when qualified for an existing opening, rather than being sent to Local 37. See, e.g., R.T. 2715-16; J.A. 159-60; R.T. 2889; J.A. 614; R.T. 2833. Minorities who have worked as part of the Local 37 crew and have applied for at-issue jobs in the off season have been hired in those jobs. See Pet. App. I:88 (Peters, a/k/a Atonio); J.A. 463-64; R.T. 2771-72.

<sup>11</sup> Respondents argue that Ex. 614 shows promotion discrimination, but the trial court found otherwise. Moreover, this exhibit only accounted for a minute portion of the jobs filled at the five canneries combined and did not address the issues presented.

### D. Hiring in Alaska.

Respondents argue that petitioners targeted villages in Alaska for racial reasons.<sup>12</sup> The hiring patterns in Alaska were dictated by geography, as the District court found. (Pet. App. I:38, 39.)<sup>13</sup> The bush country in Alaska, which is dominated by Alaska Natives, is an area of no roads and no telephones; it is sparsely populated; and there is no public transportation other than air strips (J.A. 481-485). Bush pilots may have the ability to hire unskilled workers but have no idea as to the requirements for other jobs (R.T. 1125). Petitioners also tap Alaska sources for cannery workers that because of geography are heavily white, e.g., the cities of Kenai and Ketchikan and the Air Force base at King Salmon in Bristol Bay. (Pet. App. I:38-39; E.R. 16; J.A. 617.)

The companies hired relatively few employees for any at-issue jobs from Alaska (probably because of its distance from the hiring centers in Seattle and Astoria), but to the extent they did, Alaska Natives received the vast majority of the jobs. Pet. Br., p. 8, n.13. Certain areas of Alaska do provide skilled workers, such as the native boat building community on Kodiak Island which is tapped by the CWF Port Bailey and Alitak canneries. (R.T. 1126.)<sup>14</sup>

<sup>12</sup> Resp. Br., p. 7.

<sup>13</sup> Respondents make much of the recruitment of unskilled workers in the Alaska Native villages and imply that the practice had a significant role in recruiting new cannery workers. Resp. Br., pp. 7-10. In fact, Wards Cove never used the practice; at Red Salmon only 5% of the new cannery workers hired 1971-80 were Alaska Native (17/338); and at Bumble Bee (South Naknek) only 17% of the new cannery workers were Alaska Natives (129/767) and, of those, three-fourths were hired 1971-73, at which point Bumble Bee decided not to use the practice any longer. Ex. A-403, Tbl. 1, 2, 5 row "cannery worker"; Ex. A-64 (Bumble Bee employees, years 1971-80); See E.R. 16; R.T. 1515-1516. At Red Salmon 11% of the new hires in at-issue jobs were Alaska Natives; at Bumble Bee they were 10%. E.R. 11,12.

<sup>14</sup> Many of the Alaska Natives hired in the at-issue jobs came from the very villages where some of the bush pilot recruiting took place.

(footnote continued on following page)

Geography also takes some potential employees out of consideration. For example, all fishermen at Ekuk cannery have been independent<sup>15</sup> since 1959 (R.T. 2437). Most native fishermen prefer the Nushagak River in Bristol Bay because of its longer, more consistent run and the presence of King salmon (R.T. 2436, 2437). Thus, they fish at Ekuk, which is located on that river, rather than being available as company (employee) fishermen at Naknek (Red Salmon, Bumble Bee). (R.T. 1142.)<sup>16</sup> In addition, there was substantial evidence that many Alaska residents prefer fishing to cannery work. (R.T. 2437, 2347-48, 1141-42.)

### E. Labeling.

The District Court reviewed the instances of race labeling and found that, although not laudable, it did not deter minorities in employment. (Pet. App. I:123.) Respondents have pointed to every instance of labeling in the ten-year case period. Much of it, as the District Court found, is not as sinister as might appear.<sup>17</sup> The "native cook" at Bumble Bee was white. (J.A. 623.)

See, e.g., Exhibit 309 (employees Nos. 2, 6, 8, 16-20, 25-26, 31, 34, 35 are all Alaska Natives (Ex. A-65, pp. 767-770); Ex. A-382 (Tbl. 1 Ekuk) (showing residence of 100 Alaska Natives among "all hires" in at-issue jobs over a six-year sample period). Indeed, respondents themselves presented application exhibits for at-issue jobs from Alaska Native villages. Exs. 693, 695. Many Alaska Natives were hired in the at-issue jobs at all the remote canneries. Ex. A-403, Tbls. 2-5, Col. "Ak. Nat."

<sup>15</sup> Independent means they are not employees but are in business for themselves (R.T. 2436, 2473). Their earning potential is considerably higher than that of the cannery superintendedent. *Id.* Respondents omit that the letter they cite as nepotism evidence (Ex. 464, Resp. Br. p. 9) was referring to a job with an independent fisherman at Ekuk. (R.T. 2436-37.)

<sup>16</sup> Seventeen natives fished as a group at CWF-Egegik as company fishermen; although hired by and counted as Red Salmon fishermen for accounting purposes, they do not show up in the comparative statistics. (R.T. 1142.)

<sup>17</sup> Because most of the labeling was in internal company records, most class members would not have even seen it. Thus, respondents cited it as evidence of intent, not impact. Plaintiffs' [Respondents'] Final Argument, pp. 70-72.

Filipinos refer to themselves as such (J.A. 181); the Wards Cove Packing Co. president told the affirmative action representative (he was Filipino) to stop using the term "Filipino Bunkhouse," but he continued to use it anyway (J.A. 182). The "impossible" Eskimos referred to cannery workers who had just gone on strike for wages higher than the contract during one of the biggest salmon runs in 30 years (R.T. 1144). Alaska Natives commonly refer to themselves as "native" and have so labeled many of their organizations, e.g., Bristol Bay Native Corporation (J.A. 182); cf. Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. § 1601 *et seq.* The "Japanese" were Japanese nationals, not United States citizens, employed not by petitioners but by the companies who purchased the salmon eggs. (R.T. 1128.)

### 2. Labor Supply.

Unquestionably, selecting the relevant labor market and resolving statistical conflicts are fact-finding functions. (Br. of Pet., p. 18.)<sup>18</sup> Respondents profess shock that the District Court found the available labor supply is 10% nonwhite. They say that because half the employees hired are nonwhite, the labor supply *must be* 50% nonwhite. Resp. Br., pp. 16-18. This credibility argument was rejected by the District Court (Pet. App. I:35-42, 110-111)<sup>19</sup> which believed Dr. Rees' theory. See, e.g., J.A. 268.

<sup>18</sup> Respondents champion *appellate* fact finding on the labor supply issue. Resp. Br., p. 16 ("believed was relevant").

<sup>19</sup> Respondents argue that their own labor market analysis should have been adopted by the District Court. Resp. Br., p. 16. Plainly, there was substantial evidence to support the trial court's rejection of respondents' theory on this hotly contested issue (see, e.g., testimony of Dr. Rees, J.A. 291-294; cross-examination of Dr. Flanagan, R.T. 2065-2116). Respondents omit the fact that Dr. Flanagan's theory was also rejected in the *Domingo* case that is cited so often in their brief. *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 433 (W.D. Wash. 1977). See Resp. Br., p. 29.



Dr. Rees did not "drop" the percent nonwhite from a starting point of "47% to roughly 10%." Resp. Br., p. 18. More appropriately, he started with an unweighted civilian labor force that was from 92% to 96% white and, if anything, his adjustments raised, not lowered, the nonwhite availability percentage.<sup>20</sup> (J.A. 268-271; R.T. 1878.) The logical conclusion is that nonwhites, particularly Filipinos and Alaska Natives, receive disproportionately more, not less of available job opportunities.<sup>21</sup>

### 3. Skills.

Respondents contend that there should have been no skills adjustment to the statistics since (1) the jobs were unskilled and (2) petitioners' qualifications were subjective, and not shown to have been imposed. Resolution of this question does not change the result because the District Court found that the unskilled labor market was 90% white. (Pet. App. I:37.)<sup>22</sup>

<sup>20</sup> Petitioners hired 83% of their employees from three states (Reply Br. App. I) where the civilian labor force is 96.3% white; it is 92% white if California is included. Reply Br. App. II. Moreover, Filipinos and Alaska natives, who combined were 88% of the class members (Ex. A-476), only made up a total of 4% of the civilian labor force in the overall geographical area drawn on by petitioners. See Reply Br. App. III; Ex. A-278-A-281, Labor Pool Tbls. 5b, 6b, 7b, 8b ("Everyone in Work Force"), Col. "All Depts." They were less than 2% of the population of Alaska, Washington, and Oregon combined. J.A. 295, 296; Ex. A-35, Tbl. 17 (at p. 32); Ex. A-36, Tbl. 17 (at pp. 39-41, 42); Ex. A-37, Tbl. 17 (at pp. 39-45, 46).

<sup>21</sup> Despite these statistics, respondents still argue that white and nonwhites (i.e., Alaska Natives and Filipinos primarily), are available in equal numbers for all of the at-issue jobs. This rejected claim assumes that nonwhites are eight times more likely than whites to make themselves available for a job in the salmon canning industry and Filipinos and Alaska Natives combined are 17 times more likely than whites to be available for such jobs. See Reply Br. App. III.

<sup>22</sup> The statistical labor market analysis incorporating the skills adjustment in the tables preferred by Dr. Rees is set forth in E.R. 2-9. In nine out of 13 at-issue job families (including at-issue combined), nonwhite availability was 10% or higher after making the skills adjustment. E.R. 8-9. Also see Ex. A-278, Tbl. 5, for each tab, cited at Pet. Br., p. 20, n. 29.

Nevertheless, both arguments are wrong and very carefully omit the fact that numerous witnesses testified and the court found that most of the at-issue jobs require prior skill and experience, whether expressly articulated or not, which petitioners sought in evaluating applicants.<sup>23</sup> The isolated instances of lesser qualified persons being hired cited by respondents (Resp. Br. 13) were not sufficient to overcome the evidence that supported the Court's findings.<sup>24</sup> *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 401, n.6 (2d Cir. 1981); *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379, n. 6 (5th Cir. 1974).<sup>25</sup>

The court also found that the at-issue jobs were not fungible with the cannery worker jobs, that they required skills not readily acquired on the job, that petitioners needed experienced personnel in the jobs and hired on that basis, and that nearly all of the

<sup>23</sup> Pet. App. I:35, 45-47, 55-76, 112-123 (FF 104, 124, 126, 130, 134). See, e.g., R.T. 636, lns. 21-24; R.T. 1013, 1019-21; R.T. 2181-82; R.T. 2314-22; R.T. 2358-62, 2368-69; R.T. 2434-40; R.T. 2541-44; R.T. 2553-54; R.T. 2559-65; R.T. 2605-12, 2620-24; R.T. 2625-28; R.T. 2636-41; 2643-44; R.T. 2715-17; R.T. 2736-52; R.T. 2771-72; R.T. 2854-64; R.T. 2887-91, 2898-99; R.T. 2941-74, 2987-3002; R.T. 3153-58; Dep. of Robertson, pp. 3, 13-21 (following R.T. 3151); R.T. 3208-15; R.T. 3235-69; R.T. 3311-13, 3316-20; R.T. 1114-35, 1141-42, 1144-50; R.T. 1513-15.

<sup>24</sup> Respondents cite testimony of two tender engineers (J.A. 19-24, 60-62) but omit their cross-examination and other evidence. They worked on the one tender that was the best maintained in the fleet, and did not venture far from the cannery. One had significant prior skill, including engine overhauls. (R.T. 126-136; see also R.T. 780-790, 915-919). They also cite the "nephew" (Resp. Br. 13) who became a seamer machinist. His qualifications are shown at R.T. 705-740.

<sup>25</sup> Respondents' primary skills evidence was an industrial psychologist (Latham), who demonstrated a complete lack of knowledge of the requirements to operate a salmon cannery. For example, he opined that a tender could be safely and efficiently operated with a crew consisting of one skilled captain and three green deckhands (R.T. 2144), a crew held by another court to be unseaworthy. *Petition of New England Fish Company*, 465 F. Supp. 1003 (W.D. Wash. 1979). The District Court rejected his testimony at the close of evidence. (R.T. 2042.)



at-issue jobs required pre-existing skill and experience. Pet. App. I:35; 45-75.<sup>26</sup>

Mr. DeFrance did not present "an entirely different set of qualifications" (Resp. Br. 12), but gave his opinion as to the skills and requirements necessary to do the jobs. That opinion (R.T. 2948-2974; J.A. 470-576) was evidence serving to corroborate petitioners' evidence and the District Court's findings that prior skill and experience, pre-season availability and fluency in English are all required. This was also corroborated by evidence in Exs. 68-72, petitioners' interrogatory answers on qualifications, introduced by respondents.<sup>27</sup>

Respondents complain that the District Court did not state what "kind" of experience or skill was required for a number of jobs. Resp. Br., p. 12, n.13. This is a strained reading of the opinion. It is only common sense that when the judge (or a witness) says the carpenter job needs "substantial prior skill and experience," he means skill and work experience in carpentry, not as a bookkeeper, cook, or engineer.

#### 4. Nepotism.

Respondents grudgingly concede that their nepotism tables involve double counting (Resp. Br. 38, n. 39). However, that is only one of the many flaws the District Court could consider in rejecting them (Pet. Br. 26), none of which respondents rebutted. There were other flaws, including counting relationships with non-employees, such as independent fishermen. Ex. 604.

<sup>26</sup> Although the A.C.L.U. does not agree (Br. p. 23), the unrebutted evidence was that prior truck driving experience was required for the set net pickup driver. Ex. 68, 71; Pet. App. I:108; R.T. 2965. To be "readily acquirable," the skill must be able to be learned within a matter of days. R.T. 1129, ¶ 58.

<sup>27</sup> E.g., Ex. 68 (qualification for a commercial fisherman is "experience"; for machinist is "skilled machinists and mechanics, welders and pipe

(footnote continued on next page)

#### 5. Housing and Messing.

Respondents refuse to accept the District Court's finding that housing was not assigned on the basis of race, but on job crew and time of arrival. Resp. Br., pp. 19-20, 35-37.<sup>28</sup>

Respondents also refuse to accept the finding that employees ate their main meals with their own crew and were not grouped only with persons of their own race. Resp. Br. pp. 20-21. Their citations solely to their own evidence of labeling and isolated instances or anecdotes are nothing more than an attempt to prove pretext, *Id.*, in which they failed. Pet. App. I:119.

---

fitters"; for carpenters is "skilled carpenters . . ."; Ex. 69 (qualifications for port engineer are "journeyman training and experience . . ."; for bookkeeper is "knowledge of accounting required"; for iron chink man, "mechanical experience required"); Ex. 71 (beach boss requires "experience and training in all phases of rigging, dock instruction, pile-driving, heavy equipment, equipment operation, salvage and maintenance"; for a baker, "considerable baking experience . . .")

<sup>28</sup> There is substantial evidence to support the trial court's findings. Workers are generally housed according to job department and time of arrival. Pet. App. I:83 (F.F. 149(a)); R.T. 1137-38, ¶¶ 79-84, 86; R.T. 2832, ¶ 20; R.T. 3273, ¶¶ 11, 13; R.T. 3275, ¶ 22; R.T. 2891, ¶ 20; R.T. 3168, ¶ 17. Minorities and whites in the same job categories are not segregated by race, but are housed together. R.T. 1137-38. The Filipino workers did not want their crew to stay with the Alaska Natives because they thought they were dirty and did not keep their quarters clean. (R.T. 2578.) See Ex. A-97-100. Workers in the at-issue jobs who arrive in the pre-season are housed together regardless of race. E.g., R.T. 3215-16, ¶ 36; R.T. 2360, ¶ 11; R.T. 2378-79, ¶¶ 40-44; R.T. 754-55; see R.T. 3333, ¶¶ 56-57; R.T. 2440; R.T. 2056; R.T. 3308. Minority and white male cannery workers are also housed together. R.T. 1082-83; R.T. 824, 827; R.T. 250, ln. 24 to R.T. 242, ln. 20. Similarly, minority and white female cannery workers are also housed together, rather than separately. E.g., R.T. 2212; R.T. 700; R.T. 701.

## ARGUMENT IN REPLY

### I. Proof of Work Force Imbalance Is Not and Should Not Be Dispositive Proof of Disparate Impact.

#### A. Work Force Imbalance is Not Per Se Discriminatory.

Respondents contend that work force imbalance statistics constitute an un rebuttable presumption of disparate impact, that an employer's evidence is not relevant to the impact assessment and that the District Court's resolution of the conflicting evidence is not a function of the trier of fact; in short, they contend that work force imbalance is *per se* impact and that the work force itself, not the labor market, is the sole measure of discrimination.

Title VII itself recognizes that imbalance is not equivalent to discrimination. 42 U.S.C. 2000e-2(j); *Watson v. Ft. Worth Bank & Trust*, 487 U.S.\_\_\_\_, 108 S.Ct. 2777, 101 L. Ed. 2d 827, 843 (1988). To accept respondents' position would require the adoption of racial quotas, in this case 50% nonwhite in every job department. That balance would have to be maintained with new hiring. The employers could not draw from the external labor market without skewing recruitment to make sure that for every white hired a nonwhite was hired. This is not what Congress intended. *Id.* at 844.

Respondents simply ignore precedent holding that internal work force comparisons are to be rejected in favor of credible labor market evidence.<sup>29</sup> They mention neither the decisions of this Court and the circuit courts requiring consideration of petitioners' rebuttal evidence before determining the impact,<sup>30</sup> nor those holding that it is a fact-finding function of the trial court to determine the relevant statistical comparison.<sup>31</sup>

<sup>29</sup> Cases cited at Pet. Br. p. 20.

<sup>30</sup> Cases cited at Pet. Br. p. 17 and n. 23

<sup>31</sup> Cases cited at Pet. Br. p.20-21 and n. 31. *Accord*, *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 309-10 (7th Cir. 1988) ("especially where statistical evidence is involved, great deference is due the district court's determination...").

This is not a case like *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); or *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), where the employer trains and promotes from within.<sup>32</sup> Nor is this case like *Carpenter v. Stephen F. Austin St. Univ.*, 706 F.2d 608 (5th Cir. 1983), where the employer intentionally assigned minorities to low level jobs which they could not change. 706 F.2d at 623-25.

In spite of respondents' incantations about "channeling," the facts here are that the at-issue jobs are filled first over a period of several months from an external labor market which includes all of the persons subsequently hired as cannery workers. Thereafter, the Local 37 dispatch is utilized.

Nor can respondents find solace in *Teal*,<sup>33</sup> which is directly at odds with their position. Resp. Br., pp. 21, 27. There, one stage of a multi-component test was shown to have impact and the defense of "bottom line" statistics rejected. Here, respondents cannot show any single causal effect, yet seek to challenge the entire selection system on their own "bottom line" statistics, while asserting petitioners cannot respond in kind.<sup>34</sup>

<sup>32</sup> *James* is explained by the Fifth Circuit in *Rivera v. City of Wichita Falls*, 665 F.2d 531, 541, n. 16 (5th Cir. 1982). *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982) cited at Resp. Br., p. 27, n. 26, simply held that crediting plaintiffs' applicant flow statistics was not clearly erroneous. 673 F.2d at 823. But *Payne* also rejected "bare work force statistics" on plaintiffs' claim of discrimination in initial job assignments. *Id.* at 824-25. Using these decisions is an attempt to pound a square peg into a round hole.

<sup>33</sup> *Connecticut v. Teal*, 457 U.S. 440 (1982). The United States in its brief, p. 22, suggests that certain multi-component selection devices may be challenged or defended as a whole.

<sup>34</sup> The remaining cases cited by respondents are inapposite. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 579 (1978), is taken out of context. There, the court stated an individual claim could not be rebutted by proportional representation statistics. Neither *New York Transit*

(footnote continued on next page)



Respondents contend that the District Court made errors of law in arriving at its findings, but then they proceed to argue the facts. Resp. Br., pp. 30-31. They state that there are cases where recruitment from heavily white sources can distort the labor market,<sup>35</sup> but cannot show distortion in this case. Dr. Rees used the large population areas from which petitioners draw their sources. The trial court's acceptance of this careful analysis is a factual finding.

### **B. Policy Considerations Strongly Disfavor Internal Comparisons.**

Without authority to support their position, respondents urge that comparative statistics should be preferred over labor market data on the ground that they afford "certainty, simplicity, and ease of use." (Resp. Br. 21, 29.)

Simplicity may lead to clearly erroneous conclusions because the internal work force comparisons tell us nothing about applicant flow or qualifications.<sup>36</sup> It leads to rigid quota-based hiring and leaves the employer in total command of the standard by which his practices will be measured.

*Authority* *u. Beazer*, 440 U.S. 568 (1979), nor *Bazemore u. Friday*, 478 U.S. 385 (1986), dealt with the factual situation here, nor did they hold a labor market analysis was irrelevant. *Teamsters* involved fungible jobs and non-whites were excluded from one. 431 U.S. 324 (1977).

<sup>35</sup> *Domingo u. New England Fish Co.*, 445 F. Supp. 421 (W.D. Wash. 1977), *rev'd on other issues*, 727 F.2d 1429, *modified* 742 F.2d 520 (9th Cir.) (1984); *Williams u. Owens Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982); *Markey u. Tenneco Oil Co.*, 635 F.2d 497 (5th Cir. 1981). *Domingo* was a treatment case where because of that employer's practices the findings went the other way. The District Court was, however, obviously troubled by institutional factors. 445 F. Supp. at 433. The Ninth Circuit in this case noted the limited applicability of *Domingo*. (Pet. App. III:18-19, 29-31.) *Williams* and *Markey* confirm that the relevant labor market is a fact issue. 707 F.2d 172, 175 (5th Cir. 1983) (after remand).

<sup>36</sup> One author illustrates how comparative statistics can either hide discrimination or show it when none exists. Scanlan, *Illusions of Job Segregation*, 93 The Public Interest 54 (1988).

Respondents say (Resp. Br., p. 29) that this just means employers will discriminate — they miss the point. The vice of the imbalance theory is that it *allows* such behavior as long as the work force is in balance. On the other hand, if the employer exceeds the balance for minorities in one job classification, he does so at his peril. The imbalance theory in effect punishes the socially responsible employer, offers no independent, objective external measure of his practices, and leaves no room for traditional management prerogatives. This is an extraordinarily high price to pay for a theory that promises only "certainty, simplicity, and ease of use."<sup>37</sup>

### **C. Instances of Statistical Significance.**

Respondents contend that by isolating four job family evaluations from the whole,<sup>38</sup> the statistical significance of those groups establishes a *prima facie* case. Resp. Br., 17, 25.<sup>39</sup> The four job groups have been selected out of 138 (Reply Br., App. IV), but pure chance could account for this since one would expect two standard deviations in seven out of 138 categories (5%) — even from a nondiscriminatory employer. R.T. 1725, ¶37 (Dr. Wise).

But there were reasons other than chance to explain such deviations. The Court found a lack of cannery worker interest in

<sup>37</sup> "Many a promising theory founders on the facts . . . and those in our record demonstrate that word-of-mouth recruitment at this refinery has not proved a discriminatory practice." *Markey, supra*, 707 F.2d at 174.

<sup>38</sup> Tender jobs at Red Salmon; machinist and fishermen at Bumble Bee; the tender jobs for Wards Cove and Red Salmon combined ("at WCP").

<sup>39</sup> Statistical significance is not the equivalent of legal significance. *EEOC u. Federal Reserve Bank of Richmond*, 698 F.2d 633, 648 (4th Cir. 1983); *Gay u. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 551, 552-55 (9th Cir. 1982) (waiter job). See *Allen u. Prince George's County, Md.*, 737 F.2d 1299, 1307 (4th Cir. 1984) (no liability where four out of eight classifications exceeded two standard deviations); *EEOC u. Western Elec. Co.*, 713 F.2d 1011, 1019-23 (4th Cir. 1983) (age case).



applying<sup>40</sup> and students (often cannery workers) were not available. There was substantial evidence that Alaska Natives preferred fishing to cannery jobs, including tender jobs (R.T. 2437, 2772; J.A. 163-4). The Native fishermen in Bristol Bay for the most part preferred to fish at Ekuk rather than Bumble Bee (J.A. 179).<sup>41</sup>

## II. The Causation Gap.

Respondents concede an inability to prove separate causation. They assert that petitioners admitted causation with the "asserted" qualifications and the use of Local 37 for cannery worker jobs. But the petitioners' labor market data showed that elimination of the "skills adjustment" could not change the result. (See *supra*, p. 8.) Neither Local 37 nor hiring from the villages could have any effect on at-issue jobs.<sup>42</sup> Respondents' contention that proof of causation is not required (Resp. Br. 41) is directly contrary to existing case law. (Pet. Br. 30-33.)

## III. Respondents' Proof Does Not Establish an Unrebuttable Presumption.

In respondents' view, an inference of disparate impact can only be defended by proving business necessity as an affirmative defense. They rely on *Griggs* and its progeny.<sup>43</sup> The problem in

<sup>40</sup> This is an absolute defense to segregation claims. Cases cited in Equal Employment Advisory Council Am. Br. p. 14. See *EEOC v. Sears, Roebuck & Co.*, *supra*, n.31 (such lack of interest undermined statistics).

<sup>41</sup> If the native fishermen at CWF-Egegik are added to the Bristol Bay pool for all facilities, the nonwhite percentage of company fishermen rises to 26.63% (Ex. A-403, Table 22). It is logical that they are included. (J.A. 179-80; R.T. 1142, 2861.)

<sup>42</sup> Respondents do argue that Local 37 has no control over the dispatch. The facts and findings are otherwise, but it is not relevant in an impact case involving *other* jobs in any event.

<sup>43</sup> *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

automatically applying such cases at all is that in each the plaintiff had proved a discrete, single, objective, facially neutral employment practice to have actually *caused* the disproportionate exclusion of the protected group.

Though denominated a *prima facie* showing, the *Griggs* proof was much more than that. The *prima facie* case is normally the threshold of evidence which will permit, but not require, the trier of fact to find in plaintiff's favor. *Wright v. Rockefeller*, 376 U.S. 52 (1964). See *Christie v. Callahan*, 124 F.2d 825, 827, 840 (D.C. Cir. 1941). In *Burdine*,<sup>44</sup> this Court raised the threshold one step further, and held that the *McDonnell Douglas*<sup>45</sup> elements of proof in a disparate treatment case would create a rebuttable presumption — provided the evidence is believed.<sup>46</sup>

Courts have not extended *prima facie* evidence to the level respondents suggest — an unrebuttable presumption which limits the only defense to an affirmative one.<sup>47</sup>

In each of the decisions of this Court which put an employer to the proof of business necessity, not only had the plaintiff established that an objective, rigidly applied head wind had automatically been applied, but the employers basically admitted it. They chose to defend on the ground that the head wind was

<sup>44</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

<sup>45</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>46</sup> This Court identified the two distinct burdens. 450 U.S. at 254. The creation of the rebuttable presumption does not arise until the plaintiff establishes the essential elements of his *McDonnell Douglas* case. Belief and credibility still remain a function exclusively of the trier of fact.

<sup>47</sup> The plaintiff must always establish the elements of his case. See Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 7 (1959). *NLRB v. Transp. Management Corp.*, 462 U.S. 393 (1983), cited by respondents for the proposition that the court may change the burden of persuasion on an issue, expressly holds the plaintiff must prove the elements of his case.

justified, as in *Griggs*, where the employer thought it would simply improve the overall work force.<sup>48</sup>

Respondents' case rests on far weaker grounds; they cannot even prove causation and urge the Court to place that burden on the employer also. There are fundamental and sound reasons why the ultimate burden of persuasion should remain with the plaintiff. It is based on the principles that (1) he who seeks to change the present state of affairs should bear the risk of non-persuasion; and (2) he who denies a fact cannot normally produce any proof.<sup>49</sup> Here, the respondents seek both to change the state of affairs and to require petitioners to prove the negative of several possible causes of impact: (1) failure to recruit; (2) failure to post; (3) failure to use objective criteria; and (4) failure to promote. (Resp. Br. 25, 40.)

Respondents and their *amici* also contend that the burden should be on the employer to prove lack of causation on grounds that the employer normally maintains the employment records.<sup>50</sup>

<sup>48</sup> In *New York Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979), the employer defended by attacking plaintiffs' statistics as well.

<sup>49</sup> E. Cleary, *McCormick on Evidence*, § 337 (3d Ed., 1984); J. Buzzard, 10 *Phipson on Evidence* 36 (12th Ed. 1976); *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* [1942] A.C. 154.

It is an ancient rule and founded on considerations of good sense and should not be departed from without strong reasons.

*Id.* at 174. The rule is traced to the era when if a trial by combat ended in a draw, the plaintiff lost. W. Blackstone, 3 *Commentaries*, \*340 (1900).

<sup>50</sup> They also contend that certain application records were destroyed. Petitioners routinely disposed of applications until two years into the case period, when plaintiffs requested them for the first time. R.T. 1143. They were then retained but were not useful since most of them did not contain the race of the applicant. *E.g.*, Ex. 693. Since respondents are involved in a seasonal industry, they are specifically exempt from keeping such records for even six months. 29 C.F.R. 1602.14(b). Nor do the Guidelines have the force of law as respondents contend. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

The court in *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), Petition for Cert. filed (No. 88-141), states that the employer is in the best position to know. But the same logic can be applied to any tortfeasor: he who collides with a car is in the best position to know if he is negligent but should he have the burden of proving no negligence? The concept is neither practical nor in accordance with existing law.<sup>51</sup>

The distinction between a *prima facie* case and an unrebuttable presumption is an important one for it explains the Ninth Circuit's error in this case. The Court of Appeals took the respondents' collective evidence and determined that:

The statistics show *only* racial stratification by job category. This is sufficient to raise an *inference* that some practice or combination of practices has caused the distribution of employees by race and to place the *burden* on the employer to justify the business necessity of the practices identified by the plaintiffs. (Emphasis supplied.)

Pet. App. VI:18. The court, having recognized that the treatment inference created by the totality of respondents' evidence had been rebutted, determined that the same evidence was now unrebuttable. Only the name of the analytic model had changed.

Respondents and their *amici* suggest that an unrebuttable presumption is created at any time imbalance in the work force can be shown, and the burden of proving affirmative defenses extends to each practice named. This is clearly not the teaching of *Griggs*. If indeed respondents did make a *prima facie* showing,<sup>52</sup> it was answered.

<sup>51</sup> Civil discovery procedures with modern computer aided technology are formidable tools in the hands of a skilled plaintiff's lawyer who can select the information he chooses. Petitioners spent thousands of hours in compiling information answering respondents' first wave of discovery. Routinely, such techniques are employed in a wide variety of complex litigation. *Manual for Complex Litigation* (1986).

<sup>52</sup> Respondents wrongly contend that the existence of a *prima facie* case cannot be challenged after denial of a motion to dismiss. Denial of such a motion may be discretionary, is only tentative, and does not preclude later findings and determinations inconsistent with it. *Weissinger v. United States*, 423 F.2d 795, 797-798 (5th Cir. 1970); J. Moore, 5 *Federal Practice* § 41.13(4), p. 41-179.

The plurality of this court in *Watson* determined there should be one analytic model in discrimination cases; this case should set forth the elements of a single order of proof to redefine in discrimination cases that a *prima facie* case is subject to rebuttal before the necessity of an affirmative defense.

### CONCLUSION

Respondents' imbalance theory of impact should be rejected. It is contrary to law, wholly impractical, and seriously undermines the goals of Title VII. Without it respondents have no case. For the same reasons the Court should reject respondents' business necessity argument and their argument that the impact theory can be used to challenge multiple practices without separate proof of causation.

Respectfully submitted,

Douglas M. Fryer\*  
 Douglas M. Duncan  
 Richard L. Phillips  
 MIKKELBORG, BROZ,  
 WELLS & FRYER  
*Attorneys for Petitioners*

\* Counsel of Record

### APPENDIX I

#### PERCENTAGE OF NEW HIRES FROM WASHINGTON, OREGON, AND ALASKA: ALL ALASKA FACILITIES OF DEFENDANTS, EXCEPT ICY CAPE\*

	State of Residence:				Percent From Alaska + Washington + Oregon
	<u>Alaska</u>	<u>Oregon</u>	<u>Washington</u>	<u>Other</u>	
Number of New Hires:	3356	943	3694	1610	83.2

\* This table is a summary drawn from Exhibits A-63 through A-69, and A-71 through A-74.



## APPENDIX II

WHITE PERCENTAGE OF CIVILIAN LABOR FORCE  
OVER AGE 18 FROM FARWEST STATES\*

	<u>Total Number In Civilian Labor Force</u>	<u>Number of Whites (%)</u>
1. Alaska, Washington, and Oregon	2,204,068	2,122,011 (96.3%)
2. Alaska	98,296	84,970 (86.4%)
Washington	1,295,958	1,246,620 (96.2%)
Oregon	809,814	790,421 (97.6%)
California	<u>7,778,047</u>	<u>7,004,757</u> (89.9%)
Total (AK, WA, OR and CA)	9,992,115	9,126,768 (91.99%)

\* This is a summary drawn from Exhibits A-35 (Alaska), Table 53, p.100 (over age 16); A-36 (Washington), Table 46, p.138; A-37 (Oregon), Table 46, p.129; and A-38 (California), Table 46, p.383.

## APPENDIX III

NUMBER AND PERCENTAGE OF WHITE AND  
MINORITY COMPONENTS OF CIVILIAN LABOR FORCE  
IN FARWEST NEEDED TO PRODUCE 5,000 EMPLOYEES  
PER YEAR FOR SALMON INDUSTRY

1. *Assumed Facts:* Entire civilian labor force in geographical area drawn on by defendants is 89% white, 11% nonwhite (non-white: 4% Filipino and Alaska Native; 7% Asian and other Minority). Exhibit A-281, Labor Pool Table 5b, Col. "All Departments".\* (Unweighted, the percent white is greater than 91%. See Reply Br. App. II and Exhibits A-35 through A-38.) The civilian labor force numbers approximately 10 million persons. Reply Br. App. II. Thus, there are 8.9 million whites and 1.1 million nonwhite (400,000 Filipino and Alaska Native; 700,000 Asian and Other Minority).

The industry will employ 5,000 persons (testimony Dr. Smith) and the number of whites and nonwhites who would make themselves available for those 5,000 is equal. That is, Dr. Flanagan's theory that the labor supply is 50% nonwhite is assumed. Thus, it will take 2,500 whites and 2,500 nonwhites to fill the industry jobs.

2. *Comparison of White vs. NonWhite:* 2,500 of 8.9 million whites and 2,500 out of 1.1 million nonwhites are "available". That is, .028 percent of whites are available, but .22 percent of nonwhites are available.

The ratio of nonwhites to whites is .22 percent divided by .028 percent equals 7.85. That is, nonwhites are approximately eight times as likely as whites to take the jobs in a freely competitive labor market under Dr. Flanagan's theory.

3. *Comparison of Whites to Filipinos and Alaska Natives Combined:* Assuming that between them Filipinos and Alaska

\* This table uses no skill differentiation ("all workers"), the broadest availability class ("everyone in work force") and weighting based on plaintiffs' preferred method of counting, "All Hires". The percent white is slightly higher in Exhibit A-278 ("New Seasonal" Hires).

## APPENDIX III (continued)

Natives constitute 4/5 of the 2,500 minorities who would be available under plaintiffs' theory (Exhibit 631; Exhibit A-406, Table 34, Row "All Jobs"), then it would take 2,000 of the 400,000 Filipinos and Alaska Natives in the civilian labor force to fill slots under Dr. Flanagan's theory. That is, .5 percent of the total number of Filipinos and Alaska Natives in the civilian labor force are "available".

The ratio of Filipinos and Alaska Natives to Whites is .5 percent divided by .028 percent equals 17.85. That is, Filipinos and Alaska Natives are approximately 18 times as likely as whites to take the salmon canning jobs in a freely competitive labor market under Dr. Flanagan's theory.

## APPENDIX IV

**INSTANCES OF STATISTICALLY SIGNIFICANT  
UNDERREPRESENTATION OF NONWHITES IN AT-ISSUE  
JOBS IN PETITIONERS' LABOR MARKET ANALYSIS\***

Name of Cannery or Combination of Facilities	No. of At Issue Job Families Evaluated**	Number Showing GREATER THAN 1.96 Std. Dev.	Number Showing LESS THAN 1.96 Std. Dev.
Wards Cove	8	0	8
Red Salmon	11	1	10
Alitak	11	0	11
Ekuk	11	0	11
South Naknek	12	2	10
Wards Cove & Red Salmon	11	1	10
WCP Interests (Class Facilities)	12	0	12
WCP Interests (All Alaska Operations except Icy Cape)	13	0	13
CWF (Alitak & Ekuk)	11	0	11
CWF (Alaska Operations except Icy Cape)	13	0	13
Castle & Cooke Interests (Class Facilities)	12	0	12
Castle & Cooke Interests (All Alaska Operations except Icy Cape)	13	0	13
<b>TOTAL</b>	<b>138</b>	<b>4</b>	<b>134</b>

\* This is a summary drawn from Ex. A-278, Table 4 for each Tab.

\*\* Job families, including "at issue combined", with one or more employees.

③

No. 87-1387

Supreme Court, U.S.

FILED

SEP 9 1988

JOSEPH F. SPANGL, JR.

CLERK

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1988

---

**WARDS COVE PACKING COMPANY, INC., ET AL., PETITIONERS**

**v.**

**FRANK ATONIO, ET AL.**

---

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS**

---

**CHARLES FRIED**  
*Solicitor General*

**WM. BRADFORD REYNOLDS**  
*Assistant Attorney General*

**ROGER CLEGG**  
*Deputy Assistant Attorney General*

**RICHARD G. TARANTO**  
*Assistant to the Solicitor General*

**DAVID K. FLYNN**  
**LISA J. STARK**  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

---

---



### QUESTIONS PRESENTED

1. In this discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, whether the court of appeals correctly held that respondent-employees' statistical evidence, which showed a marked disparity between the proportion of minorities in the jobs at issue in the case and the proportion of minorities in other jobs of the same employers, made out a prima facie case of disparate impact in selection for the jobs at issue.

2. Whether the court of appeals improperly allocated the burdens of proof and engaged in impermissible factfinding in applying disparate impact analysis to the challenged employment practices.

3. Whether disparate impact analysis allows employees to challenge the cumulative effect of a wide range of alleged employment practices.

## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Statement .....	1
Introduction and summary of argument .....	12
Argument:	
I. The court of appeals incorrectly held that respondents' statistics made out a prima facie case of disparate impact .....	16
II. After a plaintiff makes out a prima facie case showing that an identified selection mechanism causes a disparate impact, the employer has the burden of producing enough evidence to sustain a judgment in its favor that the challenged mechanism significantly serves legitimate business goals, and the plaintiff may then prevail by proving the contrary or by showing that an alternative practice with a less disparate impact equally serves those goals .....	21
Conclusion .....	29

## TABLE OF AUTHORITIES

### Cases:

<i>Aguilera v. Cook County Police &amp; Corrections Merit Board</i> , 760 F.2d 844 (7th Cir.), cert. denied, 474 U.S. 907 (1985) .....	24
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) ....	13, 14, 17, 23, 25, 28
<i>Board of Trustees v. Sweeney</i> , 439 U.S. 24 (1978) .....	26
<i>Burwell v. Eastern Air Lines, Inc.</i> , 633 F.2d 361 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981) .....	24
<i>Chrisner v. Complete Auto Transit, Inc.</i> , 645 F.2d 1251 (6th Cir. 1981) .....	10, 24
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	9, 13, 14, 22, 23
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	13, 17, 23, 25
<i>EEOC v. Rath Packing Co.</i> , 787 F.2d 318 (8th Cir. 1986), cert. denied, No. 86-67 (Oct. 14, 1986) .....	17

## IV

Cases—Continued:	Page
<i>Eubanks v. Pickens-Bond Constr. Co.</i> , 635 F.2d 1341 (8th Cir. 1980) .....	18
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) ....	25,
	26, 29
<i>Grano v. Dep't of Development</i> , 637 F.2d 1073 (6th Cir. 1980) .....	17
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	13, 17,
	22, 23, 24, 25
<i>Hammon v. Barry</i> , 813 F.2d 412 (D.C. Cir. 1987), cert. denied, No. 87-1150 (May 31, 1988) .....	17
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977) .....	16, 17, 18
<i>Hester v. Southern Ry.</i> , 497 F.2d 1374 (5th Cir. 1974) ....	17
<i>Johnson v. Transportation Agency</i> , No. 85-1129 (Mar. 25, 1987) .....	25
<i>Kinsey v. First Regional Securities, Inc.</i> , 557 F.2d 830 (D.C. Cir. 1977) .....	24
<i>Kirby v. Colony Furniture Co.</i> , 613 F.2d 696 (8th Cir. 1980) .....	24
<i>Lewis v. NLRB</i> , 750 F.2d 1266 (5th Cir. 1985) .....	17
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	26
<i>Metrocare v. Washington Metro. Area Transit Authority</i> , 679 F.2d 922 (D.C. Cir. 1982) .....	17
<i>Mister v. Illinois Cent. Gulf R.R.</i> , 832 F.2d 1427 (7th Cir. 1987) .....	17
<i>Moore v. Hughes Helicopters, Inc.</i> , 708 F.2d 475 (9th Cir. 1983) .....	17
<i>New York Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	13, 17, 23, 24, 25, 26
<i>NLRB v. Transportation Mgmt. Corp.</i> , 462 U.S. 393 (1983) .....	26
<i>Parson v. Kaiser Aluminum &amp; Chemical Corp.</i> , 575 F.2d 1374 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979) .....	24
<i>Piva v. Xerox Corp.</i> , 654 F.2d 591 (9th Cir. 1981) .....	17
<i>Reynolds v. Sheet Metal Workers, Local 102</i> , 702 F.2d 221 (D.C. Cir. 1981) .....	18
<i>Rowe v. Cleveland Pneumatic Co. Numerical Control</i> , 690 F.2d 88 (6th Cir. 1982) .....	17

## V

Cases—Continued:	Page
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	13, 17,
	18, 28
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	26, 27
<i>United States v. County of Fairfax</i> , 629 F.2d 932 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) .....	17
<i>United Steelworkers of America v. Weber</i> , 443 U.S. 193 (1979) .....	22, 25, 27
<i>Wambheim v. J.C. Penney Co.</i> , 705 F.2d 1492 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984) .....	24
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	23, 25
<i>Watson v. Fort Worth Bank &amp; Trust</i> , No. 86-6139 (June 29, 1988) .....	passim
<i>Wheeler v. City of Columbus</i> , 686 F.2d 1144 (5th Cir. 1982) .....	18
<i>Williams v. Colorado Springs School Dist. No. 11</i> , 641 F.2d 835 (10th Cir. 1981) .....	24
Statutes, regulations and rule:	
Administrative Procedure Act, 5 U.S.C. 556(d) (§ 7(c)) ..	26
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e et seq. ....	1
42 U.S.C. 2000e-2(a)(1) .....	13
42 U.S.C. 2000e-2(a)(2) .....	13
42 U.S.C. 2000e-2(j) .....	18
29 C.F.R. Pt. 1607 .....	17
Fed. R. Evid. 301 .....	26
Miscellaneous:	
E. Cleary, <i>McCormick on Evidence</i> (2d ed. 1972) .....	26
44 Fed. Reg. 11998 (1979) .....	17
Restatement (Second) of Torts (1965) .....	26



**In the Supreme Court of the United States**

OCTOBER TERM, 1988

---

No. 87-1387

WARDS COVE PACKING COMPANY, INC., ET AL., PETITIONERS

v.

FRANK ATONIO, ET AL.

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS**

---

**INTEREST OF THE UNITED STATES**

This case presents important questions concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General has significant Title VII enforcement responsibilities. The United States, as the nation's largest employer, is also subject to Title VII requirements.

**STATEMENT**

1. Petitioners Wards Cove Packing Company and Castle & Cooke, Inc., operate salmon canneries in Alaska (Pet. App. 14). Most of the canneries are located in remote, widely separated, and sparsely populated areas of Alaska (*id.* at 116-117, 132). They operate only during the salmon run for several months each summer: they lie vacant during the winter and are re-opened and prepared for operation in May and June (the pre-season) (*id.* at 1113-1114). Accordingly, petitioners hire most of their employees from areas distant from the canneries, and the canneries furnish on-site housing and dining for the employees (*id.* at 117, 141, 1118).

Petitioners' workforce is to a large extent racially stratified. The workforce as a whole has been approximately 43% minority (principally, Filipino and Alaska Native) since 1970 (Br. in Opp. 1), and that figure is representative of the entire Alaska salmon canning industry (*ibid.*). Minorities, however, are heavily concentrated in the lower paying cannery-line jobs and, at some canneries, in certain laborer positions (Pet. 4-5; Br. in Opp. 1-2). The higher paying noncannery jobs, including clerical, administrative, machinist, and other positions, are predominantly white (Pet. 4; Br. in Opp. 1-2).<sup>1</sup>

Respondents are a class of former and current nonwhite cannery employees of petitioners (Pet. App. 12). In 1974, they brought this suit under Title VII alleging that petitioners discriminate on the basis of race in hiring, firing, paying, promoting, housing, and dining at the canneries (*ibid.*).<sup>2</sup> Pointing principally, though not only, to the disproportionate concentration of minorities in the cannery jobs, they sought to establish class-wide and individual liability both on disparate treatment and disparate impact theories.

2. After trial, the district court made detailed findings of fact on each of the many challenged practices and entered judgment for petitioners (Pet. App. 11-1130).

a. Describing petitioners' employee-selection practices, the district court found that many jobs are filled pursuant to rehire-preference clauses of union contracts. Those clauses operate like seniority provisions, so that employees who have satisfactorily worked in particular jobs in a prior season are rehired for the same jobs in the new season (Pet. App. 129, 135). The

<sup>1</sup> At issue in this case are the jobs other than those on the cannery line (non-cannery jobs) (Pet. 4; Pet. App. 128). Respondents note some variation in the minority percentage in various noncannery jobs (Br. in Opp. 1-2), while petitioners state that the overall percentage of minorities in noncannery jobs at the particular canneries at issue for the period at issue in the district court was 21% (Pet. 4). There is no dispute that minorities are heavily concentrated in the cannery jobs.

<sup>2</sup> Suit was originally brought against Columbia Wards Fisheries as well as petitioners, but the claims against that defendant were dismissed (see Pet. App. 11113) and are not at issue in this Court.

court also found that, while some workers are hired from the areas surrounding the canneries, the remainder are hired at petitioners' home offices in Washington and Oregon and transported to the canneries when their jobs begin (*id.* at 130). Notwithstanding those common elements, the channels for selection of cannery and noncannery workers are generally distinct. In particular, except for local Alaska residents and persons with a rehire preference, cannery jobs are filled through the dispatch procedure of Local 37 of the International Longshoremen's Workers Union (Local 37) (*id.* at 132-133). By contrast, with the rehire-preference exception, noncannery jobs are filled by applications submitted during the fall and winter preceding the upcoming season (*id.* at 130-131).<sup>3</sup> Petitioners generally do not post notices at the canneries for any jobs (*id.* at 129).

Those selection mechanisms largely determine the workforce, because petitioners' policy and practice have been to hire from outside its current workforce and not to promote employees from one position or department to another (Pet. App. 133-134, 139). "Employees and non-employees are free to apply for any job for which they feel qualified," however, and "[s]imilarly situated applicants are treated equally" (*id.* at 135). Nevertheless, most applicants for noncannery positions are white, and few nonwhites have applied for those positions (*id.* at 131-132).<sup>4</sup> By contrast, Local 37 "provides an oversupply of nonwhite cannery workers for all [but one of petitioners' canneries]" (*id.* at 135). The court found that most cannery workers are nonwhite and that that is so because Local 37 is the primary source of such workers and Local 37 is predominantly Filipino in its membership (*id.* at 136).<sup>5</sup>

<sup>3</sup> Petitioners receive far more applications than there are vacancies, and they generally do not consider applications or oral inquiries made during or just after the preceding season (Pet. App. 131-132).

<sup>4</sup> The court found (Pet. App. 140): "There has been a general lack of interest by cannery workers in applying for noncannery work jobs."

<sup>5</sup> Nonunion members may be hired "although they must join the union" (Pet. App. 133). At the one cannery where Local 37 has not asserted jurisdictional rights and hence does not supply cannery workers, the minority percentage of the cannery workforce is "significantly less" than at the other

The court found that the job qualifications for the cannery and noncannery jobs are generally different. All but certain designated noncannery jobs require skills and experience, and some require off-season or preseason availability (Pet. App. 130, 135-136, 155-176).<sup>6</sup> Cannery jobs generally require unskilled labor (e.g., *id.* at 137), and none requires preseason availability (*id.* at 140-141). In contrast, many of the noncannery jobs require skills that the unskilled cannery workers do not possess and cannot readily acquire on the job during the short season (*id.* at 135, 140, 147). Petitioners do not provide on-the-job training (*id.* at 145), and they try to hire experienced persons for all jobs (*id.* at 146). The court stated that cannery workers and laborers do not make up a labor pool for other jobs (*id.* at 139).

Analyzing the relevance of respondents' statistics to determining the labor pool, the court found that the available labor supply for cannery, laborer, and other unskilled jobs is 90% white and that Filipinos make up only about 1% of the population and labor force of Alaska, California, and the Pacific Northwest (Pet. App. 136-137). That nonwhites fill so large a proportion of cannery jobs thus means that they are greatly overrepresented in those jobs (*id.* at 137). For that reason, although 48% of the employees in the Alaska salmon canning industry as a whole are nonwhite, the court declined to assign much weight to that fact, explaining that "[t]he institutional factor of Local 37's overrepresentation of non-whites accounts for this statistic" (*id.* at 142). Looking particularly at the noncannery jobs, the court

canneries (*id.* at 137). Similarly, Alaska Natives make up a high proportion of the resident cannery workers in the canneries located in communities where there are substantial numbers of Alaska Natives and a significantly lower proportion at the one cannery where there are not such numbers in the community (*id.* at 137-138).

<sup>6</sup> The court listed 16 supervising jobs that require management abilities and extensive experience to perform successfully (Pet. App. 155-156) and 27 jobs that require substantial skill and experience to perform successfully (*id.* at 157-158). It also set forth, for numerous jobs, detailed lists of qualifications that are "reasonably required for successful performance" (*id.* at 158, 158-175). Finally, the court identified certain jobs that are the only noncannery jobs that are not skilled positions (*id.* at 175-176; see also *id.* at 112-113 (correcting list)).

made no finding of a general underrepresentation of nonwhites in those jobs. To the contrary, the court listed (*id.* at 143-145) numerous noncannery jobs in which it found, by reference to the relevant labor supply, that either nonwhites were overrepresented or whites were not overrepresented by a statistically significant amount.<sup>7</sup>

b. Based on those factual findings, the district court rejected respondents' challenges. After stating that the burden of proof shifts to the employer once employees have made out a prima facie case under the disparate impact theory of discrimination (Pet. App. 197-198), the court concluded that disparate impact analysis applies only to objective practices, not to subjective employer decisionmaking (*id.* at 199-1102). In this case, the court stated, disparate impact analysis applies to petitioners' English-language requirement for many jobs and to the "nepotism" that allegedly influenced the selection of employees for some jobs (*id.* at 1102-1105). The court, however, found no basis for liability in either area.<sup>8</sup> Although the court did not expressly find disparate impact analysis applicable to other practices, it examined the validity of the rehire preference without regard to the existence of discriminatory intent, finding (*id.* at

<sup>7</sup> The court also found some use of racial and ethnic labeling at the canneries (Pet. App. 176-180); recounted individual instances of alleged discrimination, without making findings on whether there was discrimination (*id.* at 184-194); found that petitioners' dining practices originated in petitioners' deference to the leadership of Local 37 (*id.* at 180-181); and found that petitioners' housing practices, which had segregative effects, were based on workers' department and arrival time, not on race (*id.* at 181-184).

<sup>8</sup> As to the language requirement, the court found that petitioners had proved that that requirement was justified by business necessity (Pet. App. 1102-1103). As to the "nepotism," the court found that, although "[r]elatives of whites and particular[] nonwhites appear in high incidence at the canneries" (*id.* at 1104-1105), those persons were highly qualified and "were chosen because of their qualifications." In addition, the court found that respondents' statistics failed to account for post-hiring marriages (*id.* at 1105). Accordingly, the court concluded, "the nepotism which is present in the at-issue jobs does not exist because of a 'preference' for relatives" (*ibid.*). The court also noted that "numerous white persons who 'knew' someone were not hired due to inexperience" (*id.* at 1122).



1121-1122) that the preference was justified by business necessity, given the importance of experience in work involving a short season, perishable foods, susceptibility of the product to lethal diseases like botulism, and other dangers.<sup>9</sup>

In analyzing respondents' other claims under the disparate treatment theory of Title VII liability, the court first reiterated that all noncannery jobs except certain designated ones were skilled and that even some of the exceptions required that the employees be available prior to the onset of the canning season (Pet. App. 1107-1109). The court then discussed the statistical evidence that respondents introduced in an effort to make out a prima facie case. It found, first, that respondents were incorrect in arguing that the historical percentage of Filipinos and Alaska Natives hired in the Alaska salmon canning industry as a whole represented the available labor pool, because institutional factors (notably, the use of Local 37) "greatly distort the racial composition of the workforce" and "Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state[s] [petitioners] draw their workforce" (*id.* at 1110-1111). Second, the court found that the high percentage of nonwhites in the cannery jobs was sufficient to make out a prima facie case of disparate treatment in certain unskilled noncannery jobs (*id.*

<sup>9</sup> The court found (Pet. App. 1126-1127) that petitioners' housing practices would survive disparate impact analysis as well as disparate treatment analysis. It explained that petitioners "established that workers arriving preseason and staying post-season required better insulated housing," that "workers are hous[ed] departmentally because the various departments worked the same shifts" (*id.* at 1125), and that "[i]t is not efficient or economically feasible to open all bunkhouses preseason to assign workers arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time" (*id.* at 1126-1127). The court similarly found (*id.* at 1127-1129) that petitioners' dining hall practices would survive disparate impact (as well as disparate treatment) scrutiny, because the creation of dining arrangements along essentially racial lines was the responsibility of Local 37, which asked for and received a separate mess and culinary crew for its members (white members included). As the court explained, the cooks "simply acceded to the wishes of the older workers who preferred the traditional food that was served" (*id.* at 1129).

at 1111-1112). But the court then found that respondents had articulated legitimate nondiscriminatory reasons for the disparity between minority representation in the cannery jobs and in unskilled noncannery jobs—chiefly, the lack of timely and formal applications from nonwhites for those jobs. The court found that respondents had not shown that those reasons were pretexts (*id.* at 1112). Third, as to the skilled noncannery jobs, the court found that the statistics concerning the percentage of minorities in the cannery jobs "have little probative value" (*id.* at 1114). The court explained that cannery workers do not constitute the proper labor force because they do not possess the skills and preseason availability required for the skilled noncannery jobs (*id.* at 1113).<sup>10</sup>

Although the district court found no prima facie case of a pattern or practice of discriminatory treatment in hiring, promoting, paying, or firing with respect to the skilled noncannery jobs based on respondents' statistics alone, the court nevertheless concluded that respondents had "raised a marginal inference of discriminatory treatment" based on the collective effect of the statistical evidence, the nepotism evidence, and individual instances of claimed discrimination (none of which the court found separately to have much probative value) (Pet. App. 1118-1119).<sup>11</sup> The court found, however, that petitioners had met their burden of producing evidence that their hiring, promoting, paying, and firing practices were motivated by reasons other than race. The court also found that respondents

<sup>10</sup> The court observed that respondents "were general[ly] aware of [the] important qualification [of preseason availability]" and that "this is not a promotion-from-within case" (Pet. App. 1114).

<sup>11</sup> The court pointed to the evidence of individual instances of discrimination, but it found that, with one exception, all of the applicants either had no preseason availability (as far as the evidence showed) or made only oral inquiries, which "are not treated as applications in the cannery industry[, as respondents] appeared to have understood" (Pet. App. 1115-1116). The court noted some evidence that some respondents were deterred from applying for better jobs. Although the court found that evidence insufficient to establish that petitioners' practices caused the deterrence, it observed that a prima facie case did not require such proof (*id.* at 1116-1118).

had not shown that petitioners' asserted motivations were pretextual or that petitioners had acted as a result of racial animus (*id.* at I119-I124). Thus, the court found that petitioners' statistics were significantly more probative than respondents'. In particular, it found that the census data, which showed a 90% white unskilled labor force and only 1% Filipino and Alaska Native population in the states from which petitioners hired employees, provided the best evidence of the available labor pool (*id.* at I119-I120).<sup>12</sup> In addition, few respondents made timely and proper applications for jobs.<sup>13</sup> As for the hiring officials' decisions themselves, the court found that "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria" (*id.* at I122).<sup>14</sup>

3. A three-judge panel of the court of appeals affirmed (Pet. App. III1-III56). With respect to disparate treatment, it found that the relevant district court factual findings were not clearly erroneous and were sufficient to support the finding that none of the challenged practices resulted in disparate treatment because of race (*id.* at III20-III43). With respect to disparate impact, the court of appeals ruled that the district court had correctly declined to apply that theory of Title VII liability to the various subjective employment practices challenged by respondents (*id.* at III43-III54).<sup>15</sup>

<sup>12</sup> The court also criticized respondents' statistics for not controlling for the (substantial) group of rehires, because the rehire preference was justified by business necessity, and because past discriminatory employment practices had not been established in this case (Pet. App. I120-I122).

<sup>13</sup> While some made oral inquiries about jobs, those inquiries did not constitute applications for jobs and "were generally made of persons without hiring authority." The court further found that applications were typically made too late in the season for preseason jobs or by applicants who were not available for those jobs. Pet. App. I123.

<sup>14</sup> The court found, too, that "whites hired were paid no more than non-whites" (Pet. App. I123), that it was "unable to find a practice of deterrence," and that various instances of race labeling were "not persuasive evidence of discriminatory intent" (*ibid.*).

<sup>15</sup> The court rejected the disparate impact challenge to the alleged practice of nepotism, explaining that the district court had not erred in finding "that no

4. The court of appeals granted rehearing en banc and vacated the initial panel opinion (Pet. App. IV1-IV2). The en banc court held that disparate impact analysis applies to subjective employment practices "provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class" (*id.* at V16; see *id.* at V5). The court also explained how such analysis should work and remanded the case to the panel for application of the standards.

To establish a prima facie case of discrimination under the disparate impact theory, a plaintiff "must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection criteria and (3) show the causal relationship between the identified practices and the impact" (Pet. App. V19-V20).<sup>16</sup> "Once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer" (*id.* at V35). Although the employer in any Title VII case may refute the statistical evidence, the court of appeals held that the employer's burden in a disparate impact case is different from its burden in a disparate treatment case. Whereas in the latter the employer must merely articulate a nondiscriminatory reason for the disparity, and the plaintiff retains the burden of persuasion, in the former the employer "must prove the job relatedness or business necessity of the practice" that is challenged, and the burden of persuasion on that issue is shifted from the plaintiff to the employer. *Id.* at V35-V36. Meeting that burden "may be

pattern or practice of nepotism existed because there was no preference for relatives" (Pet. App. III56). The district court's rejection of the challenge to the English-language requirement was not challenged on appeal (*id.* at III46 n.5). Without elaboration, the court of appeals found the challenges concerning the rehire preference and termination of Alaska Natives to be without merit (*id.* at III56).

<sup>16</sup> See also Pet. App. V34-V35 ("the plaintiffs must prove that a specific business practice has a 'significantly discriminatory impact,' " citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)); *id.* at V35 ("plaintiffs' prima facie case consists of a showing of significant disparate impact on a protected class, caused by specific, identified, employment practices or selection criteria").



an arduous task," the court noted (Pet. App. V38 (internal quotation marks omitted)), but the burden does not shift "until the plaintiff has shown a causal connection between the challenged practices and the impact on a protected class" (*ibid.*).<sup>17</sup>

5. On remand, the panel elaborated on the disparate impact standards set forth by the en banc court, applied those standards to respondents' allegations, and remanded the case to the district court (Pet. App. VII-VI44). With respect to the burden on the employer once a *prima facie* case has been made out, the panel explained that the burden in cases involving selection criteria may be met "by demonstrating that the selection criteria applied are essential to job safety or efficiency or correlated with success on the job (*id.* at VI6-VI7 (citations omitted))."<sup>18</sup> It also explained that, once the employer proves the business necessity of the challenged practices, the employees may "demonstrate that other employment practices or selection devices

<sup>17</sup> Judge Sneed, joined by three other judges, concurred separately (Pet. App. V40-V75). After explaining that the causation requirement articulated by the majority demands that there be a significant number of members of the protected group at issue who are qualified for the positions at issue (*id.* at V55-V56), he argued that disparate impact analysis should not apply to all types of employment practices. It should apply only when the plaintiff claims that "the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant"—*i.e.*, that allows the employer not to ascertain the plaintiff's true qualifications (*id.* at V59, V60). By contrast, Judge Sneed argued that disparate treatment analysis should apply when the plaintiff claims that the employer, knowing the plaintiff's qualifications, ignores them because of the plaintiff's membership in a protected group (*id.* at V59). Applying that distinction, Judge Sneed concluded that disparate impact analysis was applicable to the use of separate hiring channels and word-of-mouth recruitment for the noncannery jobs and to the rehire preference, which allowed petitioners to ignore respondents' true qualifications, but not to the housing and dining practices, which did not allow rejection of prospective minority employees without considering their qualifications (*id.* at V65-V70, V72, V73-V75).

<sup>18</sup> When employment practices other than selection devices are at issue, the court continued, the practice must be supported by "more than a business purpose"; it must "substantially promote the proficient operation of the business" (Pet. App. VI7-VI8, quoting *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981)).

could serve the employer's needs with a lesser impact on the protected class" (*id.* at VI9).

The court began its application of those standards by concluding that respondents' statistical showing of a disparity between the racial composition of the cannery jobs and that of the noncannery jobs was "sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs" (Pet. App. VI18). In so concluding, the court rejected the district court's finding that the same statistics were not probative for skilled noncannery positions because they did not reflect the pool of persons who had the required skills and were available for preseason work (*id.* at VI17). The court stated that that finding "was error because when job qualifications are themselves at issue, the burden is on the employer to prove that there are no qualified minority people for the at-issue jobs" and that "it is unrealistic to expect statistics to be calibrated to reflect preseason availability when the preseason starts only one month earlier than the season" (*ibid.*).

Reviewing the challenged employment practices, the court stated that, if there was nepotism, that is by definition a policy of preferring relatives, and such a policy would have to be justified by business necessity (Pet. App. VI20-VI22).<sup>19</sup> The court next observed that, while the district court had found that there were in fact objective criteria for noncannery jobs, it had not found that those criteria "were actually applied by those who made hiring decisions"; as the court of appeals construed them, the district court's findings showed only that skill and experience were the general qualifications looked for by the hiring officers (*id.* at VI22-VI23). As to respondents' challenge to the

<sup>19</sup> We read the court of appeals' somewhat opaque discussion on this point to leave open on remand to the district court the question whether petitioners had a policy of preferring relatives to others. The court of appeals cited evidence showing that, if the incidence of relatives in the workforce is the result of such a policy, the policy has a significantly disparate impact on non-whites in certain departments (Pet. App. VI21), because petitioners' hiring officers are predominantly white.



subjective hiring process, therefore, the court of appeals ruled that the district court must determine whether the identified job qualifications “were actually applied in a non-discriminatory manner” (*id.* at VI25), bearing in mind that “the burden is on the employer to prove the lack of qualified people in the non-white group” (*id.* at VI26). In addition, the court ruled, the district court must make findings as to the job-relatedness of the criteria actually applied (*id.* at VI27). With respect to petitioners’ use of word-of-mouth recruitment for the noncannery jobs rather than the hiring channels used for cannery jobs, the court of appeals found that there was some evidence—and that logic suggested—that some of the cannery workers had the skills for the noncannery jobs; therefore, the court held, petitioners must prove the business necessity of that hiring practice (*id.* at VI27-VI31).<sup>20</sup> The court further concluded that the district court’s finding of business necessity for the rehire preference was supported by the evidence (*id.* at VI32-VI33).<sup>21</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as applied to employee selection procedures, makes it unlawful for covered employers not to hire an individual “because of such individual’s

<sup>20</sup> The court also stated that there was insufficient evidence to support the district court’s finding that the people available through the channels for cannery-worker hiring (Local 37 and local Alaska populations) were not available for the preseason (Pet. App. VI31-VI32).

<sup>21</sup> With respect to the challenged practices other than selection criteria, the court ruled that the district court must determine whether the race labeling that was found “operates as a headwind to minority advancement” (Pet. App. VI33), that the efficiency justification for the housing practices was not sufficient to sustain a finding of business necessity unless “the companies substantiate that these measures are clearly necessary to promote the proficient operation of the business” (*id.* at VI37), that the dining practices must be analyzed anew under the disparate impact theory (*id.* at VI36), that individuals’ claims (and the defense that the individuals failed to file timely formal applications) must be evaluated after the district court completes its disparate impact analysis of petitioners’ process for selecting noncannery workers (*id.* at VI39-VI43).

race” (42 U.S.C. 2000e-2(a)(1) and (2)).<sup>22</sup> Intentional discrimination based on race is the primary way in which an employer can act unlawfully “because of” race. As the legislative history of the 1964 Act makes clear and as this Court has said, “[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.” *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Based on the assumption that certain other exclusionary practices are “functionally equivalent to intentional discrimination” (*Watson v. Fort Worth Bank & Trust*, No. 86-6139 (June 29, 1988), slip op. 6), this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), identified a second way in which an employer’s nonhiring decision might be found to be “because of” race. Under that theory, known as the “disparate impact” theory, a selection practice can be found unlawful even in the absence of a subjective intent to discriminate, if the practice has a significantly disproportionate impact on a protected group and has no “manifest relationship to the employment in question” (*id.* at 432). See *Connecticut v. Teal*, 457 U.S. 440, 446-447 (1982); *New York Transit Authority v. Beazer*, 440 U.S. 568, 584, 587 (1979); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Once the challenged selection practice is identified, the disparate impact theory does not focus on the historical fact of what the employer intended, as the disparate treatment theory does; rather, it aims at removing “artificial, arbitrary, and unnecessary barriers” to employment (*Griggs*, 401 U.S. at 431) by

<sup>22</sup> Petitioners have challenged the court of appeals’ decisions in this Court only insofar as those decisions concern employee selection procedures. The housing, dining, and other nonselection employment practices are not separately at issue in this Court. Accordingly, we limit our discussion of disparate impact analysis to selection devices. We note that this Court has not applied disparate impact analysis to nonselection employment practices and that, if such application is proper at all, it would require, at a minimum, reformulation of the standards that have been articulated to date.

Because this case involves only racial discrimination, we limit our discussion to “race,” although the statute prohibits hiring decisions because of “race, color, religion, sex, or national origin” (42 U.S.C. 2000e-2(a)(1) and (2)).

focusing on the racial impact and the business justification for the device.<sup>23</sup>

This Court's decisions have established a three-part structure for analysis of disparate impact claims: the first stage requires proof of disparate impact caused by an identified selection device (the *prima facie* case); the second requires a showing of job-relatedness by the employer; the third provides the plaintiff with an opportunity to demonstrate that there are effective alternatives to the challenged practice that have a less severe racial impact. That structure reflects the fact that Title VII was not designed to force employers to justify every selection practice. Hence, the most fundamental and well-established element of the structure is the principle that judicial inquiry into business justification in a disparate impact case is not called for until the complaining party proves a disparate impact that is caused by the challenged selection practice. See *Teal*, 457 U.S. at 446-447; *Albemarle Paper Co.*, 422 U.S. at 425 (business justification is demanded "only after the complaining party or class has made out a *prima facie* case of discrimination"). The precise contours of the other elements of disparate impact analysis are less well settled, as this Court's decision in *Watson* shows.

Petitioners' first question involves the well-established requirements of a *prima facie* case. The court of appeals ruled that respondents' statistics were sufficient to carry their burden of proving a disparate impact in petitioners' selection of employees for noncannery jobs. That conclusion is incorrect:

<sup>23</sup> The meaning given by the disparate impact theory to the statutory concept, "because of" race, is different from the meaning given by the disparate treatment theory. Whereas the latter asks whether race actually motivated the nonhiring decision, the former makes an inquiry more analogous to the statistical inquiry of what factors account for, or explain, a particular phenomenon. Moreover, rather than looking at all possible nondiscriminatory explanations, disparate impact theory narrows the focus to possible business justifications. If a selection device is found to have a disparate impact on a particular group, and no explanation for the selection device (and hence the employer's hiring decisions) can be found among sound business justifications, the only explanation remaining is race, and the nonhiring, in the terms of the statute, is therefore "because of" race.

there was no basis for the court's finding that petitioners' selection practices had a disparate impact on minorities within the pool of applicants, or persons qualified, for those jobs. Indeed, the district court's findings strongly suggest that there was no such disparate impact. Most notably, the intra-workforce stratification shown by respondents (*i.e.*, the statistical disparity between the number of minorities in the cannery jobs and the number in the noncannery jobs) is explained by the use of Local 37 for hiring in the cannery jobs; and because minorities are for that reason *overrepresented* in the cannery jobs, the stratification does not suggest that exclusionary practices cause any underrepresentation in the noncannery jobs that are at issue.

Petitioners' other questions are broad enough to encompass a challenge to the court of appeals' definition of the structure of proof in a disparate impact case. We address four aspects of that structure that the Court could appropriately address to clarify the proper functioning of disparate impact analysis. First, a plaintiff who challenges a nonselection decision must, as part of the *prima facie* case, identify the actual mechanism used for the particular selection decision at issue. It is that selection mechanism that is the proper subject of disparate impact analysis when the plaintiff has alleged discrimination in hiring. The court should not focus on various practices that are not shown to have been part of the hiring decision, let alone practices that were concededly not part of the selection mechanism at all. Second, after a *prima facie* case has been made out, the question should be whether legitimate business goals are significantly served by the use of the selection device at issue. Third, the employer should have the burden of production on that issue, but not the burden of persuasion. Fourth, the plaintiff may prevail either by disproving the employer's assertion that the selection device significantly serves legitimate business goals or by showing that alternatives exist that equally serve those goals but that have a lesser racial impact. In short, we urge the Court to adopt a framework based on the plurality opinion in *Watson*.



## ARGUMENT

### I. THE COURT OF APPEALS INCORRECTLY HELD THAT RESPONDENTS' STATISTICS MADE OUT A PRIMA FACIE CASE OF DISPARATE IMPACT

A. As the en banc court of appeals recognized (Pet. App. V19-V20), a prima facie case of disparate impact in selection for particular jobs requires that members of a protected group demonstrate that the selection mechanism caused a disparate impact on that group. That requires the plaintiffs to "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs \* \* \* because of their membership in a protected group." *Watson*, slip op. 14 (plurality opinion); see also *id.* at 2 n.2 (Blackmun, J., concurring in the judgment). Where, as here, minorities put forth statistics to show underrepresentation in the jobs at issue by comparing the number of minorities actually selected to the number of minorities in some larger pool, the definition of the pool must take account of the qualifications (including availability and interest) for the jobs at issue. A pool that is defined without reference to such qualifications cannot provide the basis for a prima facie case, because it does not support the inference that nonhiring of minorities was "because of" race rather than because of lack of qualifications.

Because the strength of statistical proof is subject to infinite gradations, the question whether particular statistics are "sufficiently substantial that they raise \* \* \* an inference of causation" (*Watson*, slip op. 14 (plurality opinion)) calls for case-by-case analysis. *Id.* at 14-15 n.3. But the common theme reflected in this Court's decisions is that the comparison must be made by reference to a pool of individuals who are in the relevant labor market and are at least minimally qualified for the jobs at issue. *Id.* at 16 ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977) (footnote omitted) ("proper comparison was between the racial composition of [the employer's] teaching staff and the racial composition of the

qualified public school teacher population in the relevant labor market"); see *Beazer*, 440 U.S. at 586 n.29 (citation omitted) (" 'qualified job applicants' "); *Teamsters*, 431 U.S. at 338-340 n.20 (same); *Dothard*, 433 U.S. at 330 ("otherwise qualified people").<sup>24</sup> A comparison with a pool that is too small (because it excludes substantial parts of the qualified labor pool) or too large (because it includes a substantial number of unqualified persons) does not support an inference that there are barriers to employment opportunities for minorities that are not present for others.

Typically, the pool of actual applicants—or, better, of qualified applicants—provides the proper benchmark for measuring disparate impact. See, e.g., *Beazer*, 440 U.S. at 585 (rejecting statistics because they told "nothing about the class of otherwise-qualified applicants and employees" who are members of the protected class); *Dothard*, 433 U.S. at 329; *Albemarle Paper Co.*, 422 U.S. at 425; *Griggs*, 401 U.S. at 426. See also *Hazelwood School Dist.*, 433 U.S. at 308 n.13 (applicant flow data would be "very relevant" and employer should be permitted to introduce such data).<sup>25</sup> In some cases, however,

<sup>24</sup> See *Metrocare v. Washington Metro. Area Transit Authority*, 679 F.2d 922, 930 (D.C. Cir. 1982) ("statistics must compare the percentage of blacks hired for given jobs with the percentage of blacks qualified for those positions"); *Lewis v. NLRB*, 750 F.2d 1266, 1275 (5th Cir. 1985); *Grano v. Dep't of Development*, 637 F.2d 1073, 1078 (6th Cir. 1980); *Piva v. Xerox Corp.*, 654 F.2d 591, 595 (9th Cir. 1981).

<sup>25</sup> See *Hammon v. Barry*, 813 F.2d 412, 427 n.31 (D.C. Cir. 1987), cert. denied, No. 87-1150 (May 31, 1988); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974); *Rowe v. Cleveland Pneumatic Co. Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); *Mister v. Illinois Cent. Gulf R.R.*, 832 F.2d 1427, 1435 (7th Cir. 1987); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 337 (8th Cir. 1986), cert. denied, No. 86-67 (Oct. 14, 1986); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 483 (9th Cir. 1983).

Adverse impact under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, is determined primarily by reference to applicant pools. See 44 Fed. Reg. 11998 (1979) (questions and answers on the meaning of the Uniform Guidelines).



the applicant pool may not be good evidence of the relevant qualified labor pool, because, for example, the plaintiff can prove that applications were deterred by the employer's conduct. See *Dothard*, 433 U.S. at 330 (no need to use applicant pool where "otherwise qualified people might be discouraged from applying" by the height and weight requirements); *Teamsters*, 431 U.S. at 365-367; *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 225 (D.C. Cir. 1981); *Wheeler v. City of Columbus*, 686 F.2d 1144, 1152 (5th Cir. 1982); *Eubanks v. Pickens-Bond Constr. Co.*, 635 F.2d 1341, 1350 n.10 (8th Cir. 1980).<sup>26</sup> Even general population statistics may be sufficient evidence for particular jobs, but when that is so, it is because those statistics "accurately reflect the pool of qualified job applicants" (*Teamsters*, 431 U.S. at 339-340 n.20). "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value" (*Hazelwood School Dist.*, 433 U.S. at 308 n.13). Cf. 42 U.S.C. 2000e-2(j).

B. The court of appeals in this case was wholly unjustified in concluding (Pet. App. VI18) that respondents' statistics sufficed to meet their burden of making out of a prima facie case of disparate impact.<sup>27</sup> Those statistics did not compare the number of selected minorities to the number that applied for the noncannery jobs. And the court of appeals did not have before it

<sup>26</sup> Similarly, if an employer has made special recruiting efforts to increase the number of applicants from a particular protected group, the applicant pool may not represent the qualified labor pool from that group, and a disparate applicant selection rate may not show a disparate impact on the qualified labor pool.

<sup>27</sup> The district court was less than clear about precisely what decision rules petitioners applied in selecting individuals for noncannery jobs — e.g., whether there was in fact a preference for relatives, and whether objective criteria were actually applied by the various hiring officers. But any uncertainties on that score are irrelevant to evaluating the court of appeals' finding of a prima facie case of disparate impact in the selection of the noncannery workforce as a whole, which was based on the proportion of minorities in the entire pool of persons selected for noncannery positions, whatever the selection device employed.

any finding that a significant number of minorities had been deterred from applying or that, for any other reason, applicant pool data were unreliable.<sup>28</sup>

The court of appeals relied only on comparisons between, on the one hand, the number of minorities in petitioners' noncannery jobs and, on the other hand, the number in petitioners' cannery jobs, the number in the Alaska salmon canning industry as a whole, and the number in petitioners' workforce as a whole. Because cannery workers made up a large portion of the latter two pools, the sufficiency of the evidence turns on whether the pool of cannery workers fairly represented the relevant labor pool for various noncannery jobs. The court of appeals had before it no findings sufficient to conclude that it did.<sup>29</sup>

In particular, the court of appeals had before it no findings, and no basis to believe, that cannery workers made up more than a small portion of the entire relevant labor pool for unskilled potential noncannery positions, or that the cannery workers were representative of that pool. Nor did the court have before it any findings, or any basis to believe, that cannery workers were even part of the relevant qualified labor pool for skilled positions. To the contrary, the district court found that respondents' statistics had "little probative value" for the skilled jobs (Pet. App. I114) and that petitioners' statistics had significantly more probative value than respondents' even for the unskilled jobs (*id.* at I119-I120).<sup>30</sup>

<sup>28</sup> The district court did note that there was some evidence of individual instances of respondents feeling deterred from applying for noncannery positions (Pet. App. I116-I118). Without reference to deterrence, the court also found that cannery workers generally showed little interest in applying for noncannery jobs (*id.* at I40). It found, too, that employees and nonemployees "were free to apply for any job for which they feel qualified" (*id.* at I33).

<sup>29</sup> The importance of the requirement of such findings, and of the overall adequacy of the statistical case, is highlighted in cases where disparate impact analysis is applied to subjective selection processes, as the nature of such processes may make the judicial inquiry into business justification particularly difficult.

<sup>30</sup> The district court also correctly criticized respondents' statistics for not controlling for the substantial number of persons who were hired under the

In fact, the district court's findings strongly suggest the opposite conclusions from those drawn by the court of appeals.<sup>31</sup> As to unskilled noncannery positions, the district court found that the best evidence of the relevant labor pool showed that 90% of that pool was white and only 1% was either Filipino or Alaska Native (Pet. App. I36-I37, I110-I111, I119-I120). Those figures show that the cannery workers, most of whom were Filipinos or Alaska Natives, were not representative of the relevant unskilled labor pool; and it is apparently not contended, in light of the actual minority representation in the noncannery workforce (see Pet. 4; Br. in Opp. 1-2; Pet. App. I43-I45), that those figures would sustain a *prima facie* case of disparate impact.<sup>32</sup> As to skilled noncannery jobs, the district court found that such jobs required skills (or preseason availability) not possessed or readily acquirable or acquired on the job by cannery workers and, indeed, that cannery workers and laborers do not make up a labor pool for other jobs (*id.* at I30, I35-I36, I39-I41, I47, I107-I109, I113).

Notably, the district court found that there was an obvious explanation for the disparity disclosed by respondents' statistics (that is, a significant difference in racial composition of the cannery and noncannery workforces). Simply put, "[t]he institutional factor of Local 37's overrepresentation of non-whites accounts for this statistic" (Pet. App. I42; *id.* at I35-I36, I110). That obvious cause of minority overrepresentation in the cannery jobs explains the disparities to which respondents point,

---

rehire preference (Pet. App. I120-I122). That preference was upheld by the lower courts, a ruling that is not challenged in this Court.

<sup>31</sup> The district court did not apply disparate impact analysis to the selection of noncannery workers generally, and there is therefore no finding that respondents' statistics did not make out a *prima facie* case under the disparate impact model. For that reason, and because there is some confusion in the district court's findings, we suggest that this Court should remand on that issue for the court of appeals to determine whether a further remand to the district court is needed for additional factual findings.

<sup>32</sup> The district court did find respondents' statistics sufficient to make out a *prima facie* case of disparate *treatment* as to unskilled jobs (Pet. App. I111-I112).

without suggesting that there is underrepresentation, or that there are exclusionary practices, in the noncannery jobs. Indeed, according to the district court's findings, if petitioners ceased using Local 37 as a hiring channel for cannery jobs, the intra-workforce stratification would apparently disappear or dwindle to insignificance—and with it the presence of large numbers of Filipinos and Alaska Natives in the industry workforce as a whole—even if there were no change whatever in the methods of selecting noncannery workers. If there would be no case of disparate impact alleging exclusion from the noncannery jobs in that circumstance, surely there should be no liability simply because petitioners have hired disproportionately large numbers of minorities for the cannery jobs.

**II. AFTER A PLAINTIFF MAKES OUT A PRIMA FACIE CASE SHOWING THAT AN IDENTIFIED SELECTION MECHANISM CAUSES A DISPARATE IMPACT, THE EMPLOYER HAS THE BURDEN OF PRODUCING ENOUGH EVIDENCE TO SUSTAIN A JUDGMENT IN ITS FAVOR THAT THE CHALLENGED MECHANISM SIGNIFICANTLY SERVES LEGITIMATE BUSINESS GOALS, AND THE PLAINTIFF MAY THEN PREVAIL BY PROVING THE CONTRARY OR BY SHOWING THAT AN ALTERNATIVE PRACTICE WITH A LESS DISPARATE IMPACT EQUALLY SERVES THOSE GOALS**

A holding that respondents failed to make out a *prima facie* case would make unnecessary any further analysis of the disparate impact challenge to the selection of the noncannery workforce as a whole. If this case is to be remanded, however, as we suggest (see note 31, *supra*), it would be appropriate for the Court to address some of the questions about disparate impact analysis that the *Watson* case left unresolved. The plurality opinion in *Watson* furnishes a proper framework for answering those questions.

A. In addition to making a statistical case of disparate impact in selection, a plaintiff's *prima facie* case challenging an employer's adverse selection decision must identify the decision



process that was actually used to make hiring decisions. See *Watson*, slip op. 13 (plurality opinion) (“[t]he plaintiff must begin by \* \* \* isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities”); see also *id.* at 2 n.2 (Blackmun, J., concurring in the judgment); Pet. App. V19-V20. Thus, as part of their prima facie case, respondents had to identify the process for selecting noncannery workers—whether by subjective judgment by individual hiring officers or by the application of objective criteria or a policy of nepotism. To be sure, certain nonselection practices may be relevant to determining the relevant labor pools—for example, if certain on-the-job practices such as segregated housing deter applicants, the applicant pool may not be a proper measure of disparate impact. But practices that are not part of the selection mechanism (including the failure to use proposed alternatives) are not themselves properly subject to disparate impact analysis in a selection case.

Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole.<sup>33</sup> But disparate impact analysis is designed to root out “‘built-in headwinds’” and “‘barriers’” to selection (*Griggs*, 401 U.S. at 432; see also *Teal*, 457 U.S. at 440), and not otherwise needlessly to intrude upon employer practices (see *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979)). Hence, in its disparate impact decisions, this Court has properly focused on the specific devices or processes, including subjective ones, that

<sup>33</sup> We do not here address whether, if an employer uses a multifactor decision process and the plaintiff proves disparate impact of the entire process, the plaintiff is required, in order to make out a prima facie case, also to test each component for disparate impact where that is possible. *Connecticut v. Teal* says that the plaintiff *may* do so in a multistage process. Whatever the scope of the third question in the petition, we limit ourselves to the point that only an employer’s selection device or devices are subject to challenge in a disparate impact selection case. Other employer practices, if subject to challenge, must be separately challenged.

the employer uses to select employees, not on the employer’s overall employment policies, including nonselection practices *Albemarle Paper Co.* (employment tests and seniority systems); *Washington v. Davis*, 426 U.S. 229 (1976) (aptitude tests); *Dothard* (height and weight requirements); *Teal* (written examination); *Beazer* (methadone user exclusion); *Watson* (subjective judgment by supervisor).

B. Once a prima facie case has been made out, judicial inquiry into the ultimate question whether the challenged nonhiring was “because of” race moves to the next two stages of disparate impact analysis—the first focusing on the justification for the selection device that produced the adverse selection decision, the second focusing on the availability of alternatives to the challenged practice that have lesser racial impact. Analytically, the two stages are closely related: they are both ingredients of the Title VII concept of business justification, because a challenged practice that causes a disparate racial impact is not justifiable—even if it is well-supported by business reasons—if there are equally good alternatives to the practice that cause a lesser impact. We discuss three aspects of the inquiry into business justification in an effort to identify a fair and workable approach to the inquiry.

1. This Court’s decisions have used different formulations of the substantive standard governing the first stage of the inquiry into business justification that is required once a plaintiff makes out a prima facie case. See, e.g., *Teal*, 457 U.S. at 446 (citation omitted) (“‘manifest relationship to the employment’”); *Albemarle Paper Co.*, 422 U.S. at 425 (“‘job related’”); *Dothard*, 433 U.S. at 329, 331-332 & n.14 (“job related”; “necessary to safe and efficient job performance”; “essential to good job performance”); *Griggs*, 401 U.S. at 431, 432 (“business necessity”; “manifest relationship to the employment”). Because those varying formulations suggest either higher or lower thresholds of justification, it would be useful for this Court to adopt a single governing formulation to



guide judicial application.<sup>34</sup> Most recently, in *Watson*, the plurality indicated (slip op. 17, 18) that "legitimate business reasons" would suffice to show a "manifest relationship to the employment." We think that the emphasis on reasonableness that is reflected in that approach was usefully encapsulated in the formulation this Court used when it found sufficient business justification in *New York Transit Authority v. Beazer*, 440 U.S. at 587 n.31, where the Court stated: the employer's "legitimate employment goals of safety and efficiency \* \* \* are significantly served by—even if they do not require—[the challenged selection rule]."

That standard does not permit a justification based on a non-business reason or on a negligible contribution to a business purpose. So low a standard would threaten to undermine Title VII's concern to "promote hiring on the basis of job qualifications" (*Griggs*, 401 U.S. at 431, 434) and its use to root out exclusionary practices that are "functionally equivalent to intentional discrimination," even though intent cannot be proved

<sup>34</sup> The different terms used by this Court have led the courts of appeals to articulate different standards as well. See, e.g., *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977) (citation omitted) (practice must have an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980) (practice must bear a "manifest relation to the \* \* \* employment"), cert. denied, 450 U.S. 965 (1981); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978) (citation and emphasis omitted) (practice must "foster safety and efficiency \* \* \* [and] be essential to that goal"), cert. denied, 441 U.S. 968 (1979); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d at 1262 ("indispensability is not the touchstone"; "practice must substantially promote the proficient operation of the business"); *Aguilera v. Cook County Police & Corrections Merit Board*, 760 F.2d 844, 847 (7th Cir.) (practice must be "reasonable" or "efficient"), cert. denied, 474 U.S. 907 (1985); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir. 1980) (practice must be shown to be necessary to safe and efficient job performance); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (citation omitted) (practice must have "legitimate and overriding business considerations"), cert. denied, 467 U.S. 1255 (1984); *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("practice must be essential, the purpose compelling").

(*Watson*, slip op. 6). At the same time, the *Beazer* standard does not require that the selection mechanism be absolutely essential to the business. So high a standard would not only be virtually impossible to meet but would threaten to put pressure on employers to avoid disparate impact liability by adopting quotas or otherwise turning their attention away from job qualifications and toward numerical balance. See *Watson*, slip op. 18 (plurality opinion). Indirectly compelling those results in the name of Title VII is not consistent with the statute, which does not contemplate so serious an intrusion on managerial prerogatives. See *id.* at 12; *Johnson v. Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 11 n.7; *Weber*, 443 U.S. at 204-207 & n.7; *Albemarle Paper Co.*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Griggs*, 401 U.S. at 431, 434. The *Beazer* standard strikes a reasonable balance.<sup>35</sup>

2. As Justice Blackmun explained in his concurring opinion in *Watson*, slip op. 2, many of this Court's decisions in disparate impact cases use language that can be and often has been read to mean that the employer assumes the burden of persuasion on the question of business justification once a prima facie case has been made out. See *Albemarle Paper Co.*, 422 U.S. at 425 (employer must "meet the burden of proving that its tests are 'job related'"); *Dothard*, 433 U.S. at 329 (employer must "prove[] that the challenged requirements are job related"); *Griggs*, 401 U.S. at 432 (employer has "the burden of showing" a manifest relationship to the job). But that language

<sup>35</sup> That standard should, of course, be applied with an appreciation of the problems of proving the precise contribution of particular selection devices to discerning important qualifications, especially "personal qualities that have never been considered amenable to standardized testing" (*Watson*, slip op. 18 (plurality opinion)). Hence, the business justification standard does not entail a requirement of formal validation. *Watson*, slip op. 17 (plurality opinion); see *id.* at 7-8 (Blackmun, J., concurring in the judgment). In addition, the standard may be satisfied somewhat indirectly—for example, by a sufficient relationship, not directly to the job at issue, but to a legitimate training program. *Washington v. Davis*, 426 U.S. at 250-252. It should also "be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices'" (*ibid.*, quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

is ambiguous, as "burden of proof" and "showing" may be used to refer either to a burden of persuasion or to a burden of production. See E. Cleary, *McCormick on Evidence* § 336, at 783-784 (2d ed. 1972). For example, in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983), the Court ruled that "burden of proof" in the Administrative Procedure Act, 5 U.S.C. 556(d) (§ 7(c)), meant only "the burden of going forward, not the burden of persuasion." And in the disparate treatment context, several of the Court's decisions referred to the defendant's burden to "prove" (*Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); or to "show" (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)) a nondiscriminatory reason for a challenged employment decision, but the Court then made it clear that the employer's burden was one of production, not of persuasion (*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256-258 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 24-26 (1978)).

We agree with the plurality in *Watson* (slip op. 17) that the same result should apply in the disparate impact context. Leaving the burden of persuasion on the plaintiff is consistent with the general rule (see Restatement (Second) of Torts § 433B (1965)) that a plaintiff at all times bears the burden of persuading the trier of fact on the basic causation element of a violation—here, that the nonhiring was "because of" race rather than for a sound business reason. Lack of business justification is a fundamental element of the violation under the disparate impact theory of Title VII liability, and a plaintiff alleging disparate impact has the "ultimate burden of proving a violation of Title VII" (*Beazer*, 440 U.S. at 587 n.31). Moreover, imposing only a burden of production keeps the disparate impact proof scheme in accord with the norm recognized in Fed. R. Evid. 301, which states that, unless otherwise provided by statute or rule, a "presumption" (here, a presumption of discrimination that arises from a *prima facie* case) shifts only the burden of going forward, not the burden of persuasion.<sup>36</sup> In

<sup>36</sup> See *Burdine*, 450 U.S. at 255 n.8. That Fed. R. Evid. 301 is relevant does not mean that it is controlling. The Court stated in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. at 404 n.7, that the rule "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible."

addition, the "strong [congressional] desire to preserve managerial prerogatives" (*Weber*, 443 U.S. at 204-207) that is embodied in Title VII counsels against a rule that imposes liability unless an employer carries a burden of persuasion to justify its business practices.

Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases. In disparate impact cases, as in disparate treatment cases, the employer's "explanation of its legitimate reasons must be clear and reasonably specific" (*Burdine* 450 U.S. at 258); the plaintiff has liberal access to discovery from the employer; and the employer has an incentive to persuade the trier of fact of the justification for its practice (which has already been shown to have a disparate impact). See *ibid.* Once the employer produces evidence of business justification, the plaintiff may, of course, introduce contrary evidence, including testimony by experts and by employees themselves, concerning what qualifications are truly related to job performance. If the risk of nonpersuasion as to the employer's state of mind does not "unduly hinder" plaintiffs in disparate treatment cases (*ibid.*), neither should plaintiffs in disparate impact cases be unduly hindered by carrying the risk of nonpersuasion as to the business justification for the challenged selection device.

Finally, given an agreed-upon substantive standard for the first-stage inquiry into business justification, the plaintiff's bearing of the risk of nonpersuasion should tip the balance against the plaintiff only in a limited class of cases. As in disparate treatment cases, the burden of production requires that the employer put forth evidence that is "legally sufficient to justify a judgment for the defendant" (*Burdine*, 450 U.S. at 255). The burden of persuasion requires more; but because the issue is governed by a preponderance-of-the-evidence standard, the allocation of the risk of nonpersuasion should alter the result only in marginal cases. Moreover, even if the plaintiff fails to persuade the trier of fact that the challenged practice does not meet the threshold business-justification standard, because it does not significantly serve legitimate business goals, the plaintiff may still prevail by showing that an alternative exists, as we discuss below.



In short, the Court should recognize a parallelism between disparate impact and disparate treatment analysis. The distinctive questions presented in a disparate impact case "do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used" (*Watson*, slip op. 6). Indeed, because the disparate impact concept of discrimination is an alternative to disparate treatment, which was the "most obvious evil Congress had in mind when it enacted Title VII" (*Teamsters*, 431 U.S. at 335 n.15), it would be anomalous to shift the burden of persuasion on a critical issue in a disparate impact case when no such shifting occurs in a disparate treatment case. As the Court explained in *Watson* (slip. op. 6), an employer should not be held "liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination."

3. If the burden of persuasion on business justification remains with the plaintiff, and the employer meets the burden of production on business justification, the plaintiff may still prevail by putting forth sufficient evidence to persuade the trier of fact that the employer's claim of business justification is unconvincing. Even if the plaintiff does not overcome the employer's claim of business justification, however, the plaintiff can still prevail by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship" (*Watson*, slip op. 17 (plurality opinion) (quoting *Albemarle Paper Co.*, 422 U.S. at 425)).

To meet the plaintiff's burden on the issue of alternative devices, it should not suffice merely to establish that there is some alternative selection procedure that has a less disparate impact. Rather, the plaintiff must show that the proposed alternative would serve the employer's business goals as effectively as the selection mechanism under challenge. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals" (*Watson*, slip op. 17 (plurality opin-

ion)). See *Furnco Constr. Corp. v. Waters*, 430 U.S. at 577-578. But if the employer shows that a test or other selection device is job-related, the plaintiff should be allowed nonetheless to secure at least prospective relief by proffering a less discriminatory test or device that equally serves the employer's purposes. The failure to use such an alternative demonstrates that the employer's present practice is not truly justified in business terms.<sup>37</sup>

### CONCLUSION

The judgment of the court of appeals should be vacated.  
Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

WM. BRADFORD REYNOLDS  
*Assistant Attorney General*

ROGER CLEGG  
*Deputy Assistant Attorney General*

RICHARD G. TARANTO  
*Assistant to the Solicitor General*

DAVID K. FLYNN  
LISA J. STARK  
*Attorneys*

SEPTEMBER 1988

<sup>37</sup> As the *Watson* plurality observed of factors such as cost (slip op. 17), the ready availability of equally effective alternatives "would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment."



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,  
*Petitioners,*  
v.

FRANK ATONIO, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE SUPPORTING PETITIONERS

*Of Counsel:*

STEPHEN A. BOKAT  
MONA C. ZEIBERG  
NATIONAL CHAMBER  
LITIGATION CENTER, INC.  
1615 H Street, N.W.  
Washington, D.C. 20062  
(202) 463-5337

GLEN D. NAGER  
(Counsel of Record)  
ANDREW M. KRAMER  
DAVID A. COPUS  
PATRICIA A. DUNN  
JONES, DAY, REAVIS & POGUE  
1450 G Street, N.W.  
Washington, D.C. 20005-5701  
(202) 879-3939  
*Attorneys for the  
Chamber of Commerce of  
the United States of America*

### QUESTIONS PRESENTED

1. Whether a plaintiff-class may state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) §§ 2000e *et seq.*, based on the cumulative effect of a wide range of non-racially motivated employment practices.

2. Whether proof that non-white persons are more heavily represented in one level of an employer's work force than in another level of that work force establishes as a matter of law that the employer's selection and employment practices have had a disparate impact on non-white persons.

3. Whether the court below improperly shifted the burden of proof and/or applied an incorrect standard of proof in holding that the selection and employment practices challenged in this case were not sufficiently justified so as to rebut any prima facie case of disparate impact made against them.

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	v
INTEREST OF AMICUS .....	1
STATEMENT .....	2
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	9
I. A TITLE VII PLAINTIFF-CLASS MAY NOT CHALLENGE THE CUMULATIVE EFFECT OF A WIDE RANGE OF SELECTION AND EMPLOYMENT PRACTICES UNDER THE DISPARATE IMPACT ANALYSIS .....	9
A. This Court Has Approved The Application Of Disparate Impact Theory Only In Cases Where A Specific Employment Practice Is Itself Shown To Cause A Significantly Dis- parate Exclusion Of Individuals In A Pro- tected Group .....	10
B. Extending The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Would Pro- duce Results That Are At Odds With The Balance Struck By Congress In Title VII.....	12
C. The Decisions Of The Courts Of Appeals That Have Extended The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Are Based On Improper Concerns.....	16
II. INTERNAL WORK FORCE STATISTICS CANNOT DEMONSTRATE THAT MINORI- TIES HAVE BEEN DISPROPORTIONATELY EXCLUDED FROM JOBS UNLESS THE EM- PLOYER HAS A POLICY OF PROMOTING FROM WITHIN .....	19



## TABLE OF CONTENTS—Continued

## Page

III. AT THE REBUTTAL STAGE OF A DISPARATE IMPACT CASE, AN EMPLOYER NEED ONLY SHOW THAT ITS SELECTION DEVICES ARE REASONABLE IN LIGHT OF THE JOB AT ISSUE AND THE NATURE OF THE BUSINESS .....	24
CONCLUSION .....	28

## TABLE OF AUTHORITIES

## Cases

## Page

<i>AFSCME v. Washington</i> , 770 F.2d 1401 (9th Cir. 1985) .....	12
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	12, 15, 25, 27
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) .....	23
<i>Bauer v. Bailer</i> , 647 F.2d 1037 (10th Cir. 1981) .....	17
<i>Clark v. Chrysler Corp.</i> , 673 F.2d 921 (7th Cir.), cert. denied, 459 U.S. 873 (1982) .....	23
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	12, 14, 17
<i>Coser v. Moore</i> , 739 F.2d 746 (2d Cir. 1984) .....	23
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	12, 20
<i>EEOC v. Federal Reserve Bank</i> , 698 F.2d 633 (4th Cir. 1983), rev'd sub nom. <i>Cooper v. Federal Reserve Bank</i> , 467 U.S. 867 (1984) .....	22
<i>Espinoza v. Farah Mfg. Co.</i> , 414 U.S. 86 (1973) .....	19
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	24, 27
<i>General Elec. Co. v. Gilbert</i> , 429 U.S. 125 (1976) .....	19
<i>Green v. USX Corp.</i> , 843 F.2d 1511 (3d Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141) .....	16, 18
<i>Griffin v. Carlin</i> , 755 F.2d 1516 (11th Cir. 1985) .....	16, 18
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	passim
<i>Harbison-Walker Refractories v. Brieck</i> , No. 87-271 (U.S. cert. granted, March 21, 1988) .....	2
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977) .....	18, 20
<i>Hilton v. Wyman-Gordon Co.</i> , 624 F.2d 379 (1st Cir. 1980) .....	23
<i>International Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	18, 20, 25
<i>Johnson v. Transportation Agency</i> , 107 S. Ct. 1442 (1987) .....	11, 14, 15, 23
<i>Johnson v. Uncle Ben's, Inc.</i> , 628 F.2d 419 (5th Cir. 1980), vacated, 451 U.S. 902 (1981) .....	21
<i>Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC</i> , 478 U.S. 421 (1986) .....	15
<i>Los Angeles, Dep't of Water &amp; Power v. Manhart</i> , 435 U.S. 702 (1978) .....	23

## TABLE OF AUTHORITIES—Continued

	Page
<i>Mohasco Corp. v. Silver</i> , 447 U.S. 807 (1980).....	19
<i>NAACP v. Medical Center, Inc.</i> , 657 F.2d 1322 (3d Cir. 1981) .....	25
<i>New York City Transit Auth. v. Beazer</i> , 440 U.S. 568 (1979) .....	<i>passim</i>
<i>Pouncy v. Prudential Ins. Co.</i> , 668 F.2d 795 (5th Cir. 1982) .....	13, 18
<i>Rivera v. City of Wichita Falls</i> , 665 F.2d 531 (5th Cir. 1982) .....	22
<i>Robinson v. Polaroid Corp.</i> , 732 F.2d 1010 (1st Cir. 1984) .....	13
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984), <i>cert. denied sub nom. Meese v. Segar</i> , 471 U.S. 1115 (1985) .....	16
<i>Ste. Marie v. Eastern R.R. Ass'n</i> , 650 F.2d 395 (2d Cir. 1981) .....	21-22
<i>Stewart v. General Motors Corp.</i> , 542 F.2d 445 (7th Cir. 1976), <i>cert. denied</i> , 433 U.S. 919 (1977) .....	17
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	11, 17, 25
<i>U.S. Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1983) .....	17
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979) .....	11, 14, 15
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	12
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 108 S. Ct. 2777 (1988) .....	<i>passim</i>
<i>Statutes and Regulations</i>	
42 U.S.C. § 1981 .....	3
Title VII of the Civil Rights Act of 1964, as amended, ("Title VII"), 42 U.S.C. §§ 2000e <i>et seq.</i> .....	3
Title VII § 703 (a), 42 U.S.C. § 2000e-2 (a) .....	6, 10
Title VII § 703 (a) (2), 42 U.S.C. § 2000e-2 (a) (2) .....	7, 11
Title VII § 703 (j), 42 U.S.C. § 2000e-2 (j) .....	<i>passim</i>

## TABLE OF AUTHORITIES—Continued

	Page
Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607 .....	19
29 C.F.R. § 1607.16Q .....	19
29 C.F.R. § 1607.3A .....	19
<i>Miscellaneous</i>	
B. Schlei and P. Grossman, <i>Employment Discrimination Law</i> (1983) .....	17
Baldus and Cole, <i>Statistical Proof of Discrimination</i> § 4.11 .....	20
Campbell, <i>Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet</i> , 36 Stan. L. Rev. 1299 (1984) .....	16, 18
H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2 (1963) .....	15
Lerner, <i>Employment Discrimination: Adverse Impact, Validity and Equality</i> , 1979 Sup. Ct. Rev. 17 .....	26
Maltz, <i>Title VII and Upper Level Employment—A Response To Professor Bartholet</i> , 77 Nw. U.L. Rev. 776 (1983) .....	14

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

---

No. 87-1387

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,  
*Petitioners,*

v.

FRANK ATONIO, *et al.*,  
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit**

---

**BRIEF FOR THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE SUPPORTING PETITIONERS**

---

**INTEREST OF THE AMICUS \***

The Chamber of Commerce of the United States of America, a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organiza-

---

\* Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.



tions in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. Many of the Chambers' members use multi-component selection and decision-making processes. Thus, the resolution of the questions presented in this case—involving whether disparate impact theory applies to challenges to the cumulative effect of multiple selection and employment practices; whether a disparity in the percentages of minorities employed in different job categories is a sufficient basis for establishing a prima facie disparate impact case; and whether and to what extent an employer must prove that a racial workforce disparity is justified by business necessity—is of significant interest to the Chamber and its members. In similar circumstances, the Chamber has filed amicus briefs with this Court. See, e.g., *Harbison-Walker Refractories v. Brieck*, No. 87-271 (U.S. cert. granted March 21, 1988); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

#### STATEMENT

1. Petitioners operate five salmon canneries in remote and widely-separated areas of Alaska. Pet. App. III:2-3. Petitioners begin operations each year in May or June, a few weeks before the anticipated salmon runs, with a period known as the "preseason." *Id.* at III:4-5. During this preseason, petitioners bring in employees to assemble equipment, repair any winter damage to the facilities, and prepare the canneries for the onset of the canning season. *Id.* at III:5. The individuals who staff the canning lines during the season—the "cannery" workers—arrive toward the end of the pre-season. *Ibid.* The cannery workers remain as long as the salmon runs last, and depart when the canning is completed. *Id.* at III:5-6. The canneries lie vacant for the rest of the year. *Id.* at III:3.

Most of the jobs in the canneries are seasonal and petitioners must reconstitute their work forces each year. Pet. App. III:8. Petitioners hire the cannery workers, who are the lowest paid members of the summer workforce, principally from native villages in Alaska and from the dispatcher of a primarily Filipino union local in Seattle, Washington. *Id.* at III:11. Petitioners hire the more highly-paid "non-cannery" workers—e.g., machinists and engineers who maintain the canning equipment; quality control personnel who conduct government-required inspections and recordkeeping; boat crews that operate transport equipment; and a variety of support personnel—from a multi-state region encompassing Alaska, the Pacific Northwest, and California. *Id.* at I:36, III:7. Petitioners select the non-cannery employees from among off-season applicants, word-of-mouth recruits, and "rehires" who worked at the canneries during prior seasons. *Id.* at III:11. They transport nearly all of these employees to and from the canneries each year, and house and feed them while they are there. *Id.* at III:8.

2. Respondents, a class of non-white employees at the canneries, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981, claiming that petitioners had discriminated against them because of their race. Pet. App. III:2, 9. Specifically, respondents alleged that petitioners had intentionally discriminated against them by using certain employment and selection practices, including separate hiring channels, word-of-mouth recruiting, nepotism, rehire preferences, language skill requirements, subjective job qualifications, and segregated housing and messing facilities. *Id.* at III:9-12. Respondents further alleged that these practices had an unlawful disparate impact on their opportunity to obtain the higher-paying non-cannery worker jobs. *Id.* at III:9.

During a lengthy non-jury trial, respondents supported their claims by showing that approximately 48 percent

of the individuals employed in the Alaska salmon canning industry since 1970 were non-white and that these non-white persons had principally been employed as cannery workers. Pet. App. I:35-36, 42. Respondents also showed that petitioners had not posted job vacancies in non-cannery positions or promoted cannery workers to non-cannery positions (*id.* at I:28-29, 33-34, 39); and that petitioners had frequently hired relatives of existing white employees (*id.* at I:104-05). Finally, respondents argued that petitioners had followed race-labeling practices and maintained racially-segregated housing and messing facilities (*id.* at I:76-84).

In rebuttal, petitioners demonstrated that, while census data indicated that the potential applicant pool for petitioners' facilities was only 10 percent non-white (without regard to place or position of current employment, skills, or pre-season availability), non-whites had been employed in 21 percent of the non-cannery positions. Pet. App. I:35-37; Pet. 4. Petitioners explained that the canning industry attracted applicants—for cannery and non-cannery positions—from a multi-state region, principally because of the high wages that were guaranteed to workers. Pet. App. I:41. Petitioners further explained that non-whites were more heavily represented in cannery worker positions than in either non-cannery jobs or the potential applicant pool, both because non-whites were concentrated in the communities surrounding the canneries and in the union from which petitioners obtained many of their cannery workers, and because the short and intense canning season generally precluded mid-season training and promoting of cannery workers and required resort to the external labor market. *Id.* at I:18-19, 32, 36-38, 41-43, 45-46. Finally, petitioners showed that their housing and messing practices were structured to accommodate workers' preferences, the workers' arrival times and departmental assignments, the cost of providing such benefits, and the demands of the

employees' collective bargaining representatives. *Id.* at I:81-84, 126-29.

The district court entered judgment in favor of petitioners. Pet. App. I:1-130. It held that petitioners' subjective decision-making criteria could not be challenged under the disparate impact theory. *Id.* at I:102. It also held that respondents had failed to prove that petitioners' language skill requirements and alleged nepotism policy had an unlawful disparate impact on non-whites. *Id.* at I:102-105. It then determined that, viewing all of the practices together, respondents had failed to establish disparate treatment. *Id.* at I:106, 119. The court found, *inter alia*, that any employee could apply for any job at the canneries (*id.* at I:33); that respondents' statistics were not probative of discrimination in the non-cannery jobs requiring skills, experience, or availability (*id.* at I:113-14); that the over-representation of non-whites in the cannery positions was attributable to non-discriminatory factors, i.e., the undue concentration of non-whites in the local communities and in the referrals from the union dispatcher (*id.* at I:109-11); and that, while respondents' evidence as a whole "raised a marginal inference of discriminatory treatment" (*id.* at I:119), petitioners had successfully rebutted that inference with relevant statistics and other evidence showing that their practices were motivated by legitimate business considerations. *Id.* at I:35-43, 110-14, 119-22, 124-29.

3. A panel of the Ninth Circuit affirmed the judgment of the district court. Pet. App. III:1-56. The *en banc* court subsequently vacated that judgment, however, and held that petitioners' subjective employment practices could be challenged under the disparate impact theory. *Id.* at V:1-75. On remand from the *en banc* court, the panel then vacated the judgment of the district court and remanded for further proceedings. *Id.* at VI:1-44.



The panel did not disturb the district court's conclusion that intentional race discrimination had not been established. Pet. App. VI:16. But the panel found that a prima facie case of disparate impact against non-whites had been demonstrated. Pet. App. VI:13-19. The panel noted that respondents had both introduced statistics showing "racial stratification by job category" and "identified certain practices which cause[d] that impact." *Id.* at VI:18, 19. The panel found that, in combination, such evidence was "sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race . . . ." *Id.* at VI:18.

Having so held, the panel turned to the particular practices at issue to determine whether each was "linked causally with the demonstrated adverse impact" and, if so, whether it was justified by business necessity. Pet. App. VI:19-39. The panel found that each practice had an "obvious" or "necessar[ly]" or "clear" link to the racial disparity in the work force. *Id.* at VI:21, 28, 36. The panel then either rejected the justifications that petitioners had offered for their practices—with the exception of the language skills and rehire policies—or remanded for further development of the facts supporting those justifications. *See id.* at VI:21, 25-27, 28, 30-32, 37-39.

#### SUMMARY OF ARGUMENT

A. Congress carefully accommodated competing objectives when it enacted Title VII in 1964. It sought in § 703(a) of the statute to achieve equality of employment opportunities by removing arbitrary and unjustified barriers to the employment of members of minority groups. But, as § 703(j) of the statute makes clear, it did so intending not to disturb traditional management prerogatives or to require employers to engage in preferential treatment of minorities or work force balancing. Recognizing this accommodation, this Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that a violation of

§ 703(a)(2) may be established without a finding of illicit motivation where an employment practice disproportionately excludes individuals in a protected group and is not justified by legitimate business needs. In its subsequent decisions, the Court has approved the disparate impact theory only where these two limiting conditions have been met—i.e., where the plaintiff has established that a particular employment practice is itself the cause of a significant racial disparity and where the practice is not justified by business necessity.

Extending the disparate impact analysis to challenges to the cumulative effect of multiple employment practices would force employers seeking to avoid Title VII liabilities to take actions that are at odds with the balance struck by Congress in Title VII and recognized by the Court in *Griggs* and its progeny. To do so would force employers, at the rebuttal stage of a disparate impact case, either to identify the practice, if any, that caused the disparity and demonstrate that that practice is justified by business necessity or to show that each component of the selection process, regardless of its individual impact, is so justified. But this shifting of evidentiary burdens would be inconsistent with this Court's statements that the plaintiff, not the employer, bears the burden of producing evidence that the challenged practice has caused the alleged statistical disparity and that proof of a mere work force imbalance will not suffice. Alternatively, of course, employers could abandon or modify their multiple selection and employment practices in an effort to avoid such challenges. But forcing employers to restructure their business practices would be inconsistent with Congress's intent that Title VII not be interpreted to allow undue governmental intervention into private business decisions. Finally, employers could superimpose numerical quotas on their selection and employment processes to ensure that they achieve a racially-balanced work force. But, again, this result would be inconsistent



with Congress' intention that employers not be required to use quotas to avoid Title VII liabilities.

The concerns expressed by some courts of appeals—(a) that plaintiffs cannot identify and prove the effects associated with the various selection and employment practices used by an employer, and (b) that several components which individually have no adverse impact may “interact” to cause a racially-imbalanced work force—do not justify the extension of disparate impact theory to the cumulative effect of multiple employment practices. Plaintiffs can use multiple regression analyses—i.e., statistical analyses that produce estimates of weights for each variable in a multi-factor process, thus indicating the effect that each variable has on an outcome—to identify and isolate the causes of racial work force disparities; plaintiffs can obtain information about an employer's selection and employment practices through the liberal rules of discovery and access to the Equal Employment Opportunity Commission's (“EEOC”) investigatory files; and the fact that no single component of a multiple component process has an adverse effect on minorities establishes that any disparity associated with the overall process is a result of either lawful factors or disparate treatment, neither of which justifies application of disparate impact analysis.

B. Respondents' internal work force statistics are insufficient as a matter of law to establish a prima facie case of disproportionate racial impact. While statistical evidence may take a variety of forms, it must, at a minimum, establish a reasonable proxy for the relevant applicant pool so that, by comparison to the pool of employees actually hired, reasonable conclusions about rates of selection and rejection can be drawn. Respondents' statistics—which focus on an internal work force imbalance and the concentration of non-white persons in the canneries' lowest paying jobs—do not establish such a proxy. Petitioners receive applications from persons both

within and without the work force, and respondents' statistics thus measure only a subset of the potential applicant pool. Reasonable conclusions about rates of selection and rejection cannot and should not be drawn from such obviously incomplete and under-inclusive data.

C. The court below misunderstood the nature of the rebuttal burden in a disparate impact case. By requiring petitioners to prove by a preponderance of the evidence that the challenged practices were justified by business necessity, the court below improperly relieved the plaintiff of its ultimate burden of persuasion in a Title VII case, equated a prima facie showing with a factual finding of discrimination, and in effect held that a practice producing an adverse impact violates Title VII even though it may be justifiable. Moreover, in applying a standard of business necessity that requires employers to demonstrate more than that their practices are reasonably related to the requirements of their business, the court below erroneously rejected the substantial business justifications that petitioners proffered in defense of their selection and employment practices.

## ARGUMENT

### I. A TITLE VII PLAINTIFF-CLASS MAY NOT CHALLENGE THE CUMULATIVE EFFECT OF A WIDE RANGE OF SELECTION AND EMPLOYMENT PRACTICES UNDER THE DISPARATE IMPACT ANALYSIS

The court below held that respondents had successfully established a prima facie case of race discrimination prohibited by Title VII. The court did not question the district court's finding that respondents failed to demonstrate intentional race discrimination. But the court concluded that respondents had established a prima facie case of disparate impact with evidence (1) that petitioners' work force is racially stratified and (2) that certain selection and employment practices are “obviously”, “nec-

essarily", and "clearly" linked to that overall racial work force imbalance. This conclusion—i.e., that, without regard to the issue of motive or the significance of the disparity caused by any particular practice, plaintiffs in a Title VII suit may state a cause of action merely by identifying employment or selection practices that are collectively linked to a racially-imbalanced work force—constitutes an unwarranted extension of the disparate impact theory and should be rejected by this Court.

**A. This Court Has Approved The Application Of Disparate Impact Theory Only In Cases Where A Specific Employment Practice Is Itself Shown To Cause A Significantly Disparate Exclusion Of Individuals In A Protected Group**

This Court has said, and the language of § 703(a) of Title VII makes clear,<sup>1</sup> that Congress' basic objective in enacting Title VII was "to achieve equality of employment opportunities and [to] remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. at 429-30. This Court has also recognized, however, that Congress had additional, competing objectives in mind when it enacted Title VII; specifically, the Court has recognized that, in § 703(j) of the

<sup>1</sup> Section 703(a) of the statute (42 U.S.C. § 2000e-2(a)) provides that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

statute,<sup>2</sup> Congress expressed its concern that Title VII not be interpreted unduly to interfere with management discretion or to require employers to grant preferential treatment to minorities. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1450-51 n.7 (1987); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979). It is against the background of these competing statutory provisions and congressional objectives that the Court has shaped the contours of the disparate impact theory.

The Court first approved the use of disparate impact theory as a means of establishing unlawful employment discrimination in *Griggs*. At issue in *Griggs* were written aptitude tests and a high school diploma requirement that the employer had adopted for the purpose of improving the general quality of its work force. Reversing a contrary holding of the court of appeals, this Court held that, in appropriate circumstances, a violation of § 703(a) (2) of the statute may be established without a finding of illicit motivation. 401 U.S. at 429-430. The Court acknowledged that "the Act does not command that any person be hired simply because . . . he is member of a minority group." *Id.* at 430-31. But the Court concluded that no such preference is required, and, indeed, an unlawful preference for members of the majority group is eliminated, by prohibiting employment practices which disproportionately exclude individuals in a protected group and which have no "demonstrable relationship to successful performance of the jobs for which [they are] used." *Id.* at 431. Because the high school diploma requirement and written aptitude tests at issue each had its own significant exclusionary effect on blacks, and

<sup>2</sup> Section 703(j) of the statute provides that "[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance" in the employer's work force. 42 U.S.C. § 2000e-2(j).



because neither selection criteria had a manifest relationship to the requirements of the jobs for which each was used, the Court held that a violation of Title VII had been established. *Id.* at 430 n.6, 431-32, 436.

In its subsequent decisions, the Court has approved the disparate impact theory only where these two limiting conditions have been met—i.e., where a specific employment practice has itself caused a significantly disproportionate exclusion of individuals in a protected group and where that practice is not manifestly related to legitimate business needs. *See, e.g., Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (prohibition on employment of methadone users); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *Washington v. Davis*, 426 U.S. 229 (1976) (written test); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (employment test). Indeed, a plurality of the Justices stated just last Term that these two limitations are irreducible requirements for establishing a disparate impact violation. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2788-91 (1988); *see also id.* at 2792 and n.2 (concurring opinion); *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) (“Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process”).

**B. Extending The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Would Produce Results That Are At Odds With The Balance Struck By Congress In Title VII**

As at least a plurality in *Watson* and several court appeals have recognized, it would be improper to extend the disparate impact analysis to challenges to the cumulative effect of multiple employment practices. *See Watson*

*v. Fort Worth Bank & Trust*, 108 S. Ct. at 2788; *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800-02 (5th Cir. 1982); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1016 (1st Cir. 1984). Such an extension would force an employer wishing to avoid Title VII liabilities either to: (1) identify the particular practice that has caused a significant exclusion of minorities and demonstrate that that practice is justified by business necessity, or show that, without regard to impact, each component of the overall employment system is individually so justified; (b) restructure its employment system—by abandoning complex, multi-step selection and employment practices and, where possible, dividing multiple task jobs into single task jobs for which simplified, and thus less difficult to defend, selection and employment practices are more suitable; and/or (c) adopt surreptitious numerical quotas to ensure achievement of a racially-balanced, and thus unchallengeable, work force composition. None of these alternatives is reconcilable with the intent of the Congress that enacted Title VII or with this Court's application of the disparate impact theory.

An employer cannot be required—merely on account of a workforce imbalance—to identify and justify the particular practice, if any, of its multiple employment practices that has caused the exclusion of a significant number of protected individuals. *See Pouncy v. Prudential Ins. Co.*, 668 F.2d at 800-801. Simply put, such a requirement would wrongly shift the burden of proof on the issue of causation to the defendant; it would require the defendant, rather than the plaintiff, either to show causation does not exist with respect to all or some of the employer's component practices or to assume that causation exists and to justify all of its employment practices.<sup>3</sup> But, as a plurality of this Court noted in

<sup>3</sup> For example, in this case, petitioners had to justify each of their component practices, even though the court of appeals admitted that two of the practices allegedly contributing to the work force imbalance—the language skills requirement and the rehire policy—were



*Watson* (108 S. Ct. at 2787), "[i]t would be . . . unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." Moreover, this Court has made clear that the plaintiff, not the defendant, bears the burden in a disparate impact case of showing that a "facially neutral employment practice had a significantly discriminatory impact" (*Connecticut v. Teal*, 457 U.S. at 446), that is, of showing the cause of a challenged disparity. And the Court has also made clear that § 703(j) of the statute precludes a plaintiff from arguing that an employer's work force balance is a sufficient basis for inferring the requisite causation and for shifting the burden of production to the defendant. See *Johnson v. Transportation Agency*, 107 S. Ct. at 1452-53; *United Steelworkers v. Weber*, 443 U.S. at 207 n.7. In short, the Court has indicated that the employer cannot be made—merely on account of a work force imbalance—to carry the burden of proof on the issue of causation.

Nor can an employer be required to restructure its employment practices to avoid the spectre of Title VII liability and the concomitant costs of defending Title VII suits. This Court has noted that "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." *United Steelworkers v. Weber*, 443 U.S. at 206. These legislators' resistance arose from their belief that "[a]ny attempt to prescribe the qualifications that employers may or may not use in job selection necessarily conflicts with a value that is deeply held by members of a broad spectrum of American society—the value of employer autonomy." Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 Nw. U.L. Rev. 776, 789

justified by business necessity, and even though respondents presented no evidence that the disparity attributable to the remaining practices was substantial.

(1983). These "legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'" *United Steelworkers v. Weber*, 443 U.S. at 206, quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Thus, even assuming that an employer could simplify its selection processes or separate its job tasks, which often would not be the case, requiring the employer to do so would represent precisely the type of federal intervention into private business that the key legislators would not accept.

For similar reasons, an employer plainly cannot be put in the position of having to adopt surreptitious quota systems in order to avoid Title VII liabilities. This Court has, of course, held that Title VII *permits* employers to engage in limited forms of voluntary affirmative action. See *Johnson v. Transportation Agency*, 107 S. Ct. at 1450-51. But, as noted above, the Court has also recognized that § 703(j) was added to Title VII to ensure that the statute would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination." *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 453 (1986). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *United Steelworkers v. Weber*, 443 U.S. at 207 n.7. A rule of law that "leave[s] the employer little choice . . . but to engage in a subjective quota system of employment selection" would thus be "far from the intent of Title VII." *Albemarle Paper Co. v. Moody*, 422 U.S. at 449 (Blackmun, J., concurring).

**C. The Decisions Of The Courts Of Appeals That Have Extended The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Are Based On Improper Concerns**

The courts of appeals that have permitted plaintiffs to challenge the cumulative effect of a wide range of employment practices under the disparate impact theory have been concerned (a) that plaintiffs do not have sufficient ability or information to isolate the particular practice, if any, that has actually caused a work force imbalance, and (b) that imbalances attributable to the interaction of several practices will escape judicial scrutiny if such challenges are not allowed. See *Green v. USX Corp.*, 843 F.2d 1511, 1522-25 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141); *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1271-1272 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). Neither concern justifies the legal rule that these courts have applied.

The concern that plaintiffs cannot isolate the particular practice or practices, if any, actually causing a work force imbalance slights both the tools available to plaintiffs in Title VII cases and the burden of proof that rests with plaintiffs. Plaintiffs in Title VII cases can employ multiple regression analyses—i.e., statistical analyses that produce estimates of weights for each variable in a multi-factor process, thus indicating the effect that each variable has on an outcome—to identify and isolate the effects attributable to the various employment practices used by an employer. See Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984). Moreover, information concerning the effects of the employer's employment practices is readily available to plaintiffs through the liberal rules of dis-

covery and through access to the EEOC's investigatory files; thus, just as a plaintiff has sufficient means for obtaining the information necessary to establish that elusive concept of discriminatory "motive," the plaintiff has sufficient means for obtaining the information necessary to establish the more tangible concept of discriminatory "effect." See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981); see also *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983). Finally, while there may be instances in which multiple regression analysis does not provide a clear answer, or in which sufficient information is not available, this Court has made clear that plaintiffs bear the burden of proof in impact cases and, *a fortiori*, that plaintiffs bear the risk of loss associated with uncertainty or unavailability of proof about causation. See *Connecticut v. Teal*, 457 U.S. at 446; see also *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. at 2790 (plurality opinion).<sup>4</sup>

The concern that an employer may devise a scheme under which several components of a selection process, none of which individually causes a disparate impact, "interact" to produce a work force imbalance is equally unfounded. An employer who, without intending to disadvantage members of the minority group, devises a system of employment practices in which no single prac-

<sup>4</sup> Of course, while plaintiffs may sometimes be unable to carry their burdens of proof under the disparate impact theory, they are much more likely, in such circumstances, to be able to carry their burdens under the disparate treatment theory. Courts applying disparate treatment theory have been most likely to find illicit motive where a plaintiff has shown that the employer's selection process produced immeasurable results, relied on immeasurable judgments, was not well documented, and resulted in a gross work force disparity. See *Bauer v. Bialar*, 647 F.2d 1037, 1045 (10th Cir. 1981); *Stewart v. General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); see generally B. Schlei & P. Grossman, *Employment Discrimination Law*, 191-205 (1983).



tice itself causes a disproportionate exclusion of minorities simply has not violated Title VII. In such a case, the bottom line disparity is attributable to an aggregation of plainly lawful factors—e.g., applicant drop-out or employee self-selection, facially neutral practices without adverse impact, and/or chance—and Title VII cannot reasonably be interpreted to prohibit employers from engaging in a combination of lawful acts. See *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2787; *Pouney v. Prudential Ins. Co.*, 668 F.2d at 801-02; *Campbell, supra*, 36 Stan. L. Rev. at 1318. Cases such as *Green v. USX Corp.*, *supra*, and *Griffin v. Carlin, supra*, provide absolutely no reasoning to support their contrary and unfounded, assertions.

The Chamber does not mean to suggest that anything in this Court's cases or the policies of Title VII would prohibit a Title VII plaintiff, in an appropriate case, from using the cumulative effect of an employer's decision-making process as proof of a Title VII violation. In appropriate circumstances, a significant imbalance in a work force, supported by probative statistical analyses, may fairly lead to an inference of intentional discrimination. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-340 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-313 (1977). But, in approving the use of statistical imbalances to establish intentional discrimination in such circumstances, the Court has stressed (*Teamsters*, 431 U.S. at 339-340 n.20) that:

the statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less

representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

Implicit in this reasoning is the quite correct conclusion that § 703(j) bars the imposition of liability in non-intent cases merely because of the cumulative effect of an employer's overall employment practices. For, if a finding of intent is not required, and a showing of racial disproportion in the bottom line is, without more, sufficient to prove a prima facie violation of Title VII, the very purpose of § 703(j)—to preclude the imposition of liability merely because the employer has a racial imbalance in its work force—would be defeated.<sup>5</sup>

## II. INTERNAL WORK FORCE STATISTICS CANNOT DEMONSTRATE THAT MINORITIES HAVE BEEN DISPROPORTIONATELY EXCLUDED FROM JOBS UNLESS THE EMPLOYER HAS A POLICY OF PROMOTING FROM WITHIN

Even assuming that the cumulative effect of petitioners employment practices can be challenged under a disparate impact theory, the court below erred in concluding that

<sup>5</sup> The Chamber recognizes that the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607, define a "selection procedure" to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision" (29 C.F.R. § 1607.16Q) and subject all such selection procedures to disparate impact analysis (29 C.F.R. § 1607.3A). But, to the extent the Guidelines approve the application of disparate impact theory to the cumulative effect of multiple practices, they are inconsistent with § 703(j) and, therefore, not deserving of deference from this Court. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).



respondents had successfully established that they were disproportionately excluded from non-cannery jobs. Internal work force statistics, such as those relied upon by the court below, cannot demonstrate that minorities have been disproportionately excluded from jobs unless the employer has a policy of promoting from within, which petitioners do not.

It is well-settled that a plaintiff can establish a prima facie case of disparate impact based on statistical evidence showing that an employment practice has had a disproportionate exclusionary effect on individuals in a protected minority group. See *Griggs v. Duke Power Co.*, 401 U.S. at 430 and n.6; *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979). To do so, the plaintiff must proffer statistics effectively measuring the effect that a challenged selection or employment process has had on applicants or employees and show that any measured disparity is "sufficiently substantial" to establish a prima facie case of discrimination. See *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2788-89. Statistics, of course, "come in infinite variety." *International Bhd. of Teamsters v. United States*, 431 U.S. at 340; see generally Baldus and Cole, *Statistical Proof of Discrimination* § 4.11 (at 106-11). But, whichever kind of statistics are used, the resulting data must establish a reasonable proxy for the relevant potential applicant pool; otherwise, reasonable conclusions about the rates of applicant selection and rejection cannot be drawn. See *Hazelwood School Dist. v. United States*, 433 U.S. at 310-12; *Dothard v. Rawlinson*, 433 U.S. at 348 (White, J., dissenting).

This Court has accordingly rejected statistical proffers that distort the potential applicant pool available to the employer. In *Hazelwood*, for example, the Court found that including a school district that maintained a teaching staff that was 50 percent black "in the relevant market area [might] distort[] the comparison." 433 U.S. at 310-11.

Similarly, in *Beazer*, the Court held that the exclusion of methadone users in private treatment programs from the available pool improperly skewed the final statistical analysis. 440 U.S. at 585-86. In short, where a statistical proffer has improperly included or excluded particular groups of individuals from the potential applicant pool, the Court has been unwilling to find that a prima facie discriminatory rate of selection or rejection has been proved.

The statistics upon which the court below relied are likewise distorted. Respondents offered no applicant flow statistics. Moreover, under the comparative statistics they offered, the pool of cannery workers was treated as the relevant applicant pool for non-cannery worker jobs. But petitioners receive applications for non-cannery work from persons residing in Alaska, the Pacific Northwest, and California. In short, the members of the cannery worker pool at most constitute only a subset of the group of persons who reasonably can and do apply for the non-cannery worker jobs. Reasonable conclusions about the rates of selection and rejection of non-whites simply cannot be drawn from such incomplete and under-inclusive data; in these circumstances, internal work force data show nothing about the percentages of minorities that an employer can reasonably be expected to hire in particular jobs. Accordingly, the court below was wrong in finding that non-whites had been disproportionately excluded from non-cannery worker jobs.

This is not to say that an internal work force comparison may never be relevant in a disparate impact case. Such a comparison may be relevant where an employer promotes only from within.<sup>6</sup> But, here, as the district

<sup>6</sup> Even in these circumstances, of course, the internal work force data must be adjusted to account for the minimum qualifications required by the positions in issue. See *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 425 (5th Cir. 1980), vacated on other grounds, 451 U.S. 902 (1981); *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395,

court found and the court of appeals did not dispute, petitioners accept applications from persons both within and without the work force. Moreover, as the district court also found, it was plainly reasonable for the petitioners to do so: Not only do petitioners' non-cannery worker jobs often require skills, training and pre-season availability that the general cannery worker does not have, but the short and intense canning season generally precludes mid-season training and promoting of cannery workers and, rather, requires resort to the external labor market. Pet. App. I:33-36, 40-41, 46-47. Indeed, because the high wages that petitioners guarantee make employment in the canneries attractive to persons in a multi-state region, the demands of equal opportunity law may well require petitioners to give equal consideration to applications received from outside the work force. In short, it is clear that the pool of cannery workers is not a reasonable proxy for the relevant potential applicant pool for non-cannery worker jobs, much less the only reasonable proxy, as the court below implicitly held.<sup>7</sup>

Allowing a *prima facie* disparate impact case to be established simply by proof that an employer has an imbalanced work force would place such an employer between Scylla and Charybdis. On the one hand, the employer would be subject to disparate impact claims from the members of the minority group that are concentrated at one level of its work force—here, for example, the Filipino and Native Alaskan cannery workers. On the

400-01 (2d Cir. 1981); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 659-60 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-43 (5th Cir. 1982). Respondents did not attempt to make such adjustments in this case.

<sup>7</sup> Not only did the court below accept respondents' plainly flawed statistical proffer, it ignored the district court's conclusion that petitioners' statistical proffer—showing that, even without regard to qualifications, the potential applicant pool in the states from which petitioners have received applications is only ten percent non-white,

other hand, were the employer to refuse to consider applications from persons outside the work force, it would be subject to disparate impact claims by members of minority groups (and, perhaps, whites) who would thereby be deprived of job opportunities—here, for example, the Hispanics residing in California who have reasonably applied for employment with petitioners. This Court has said that Title VII, and especially the disparate impact theory, should not be interpreted to impose such conflicting legal obligations on an employer. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 & n.20 (1978); *Johnson v. Transportation Agency*, 107 S. Ct. at 1451-52.<sup>8</sup>

Rather, the statute should be interpreted to allow disparate impact claims only where they are based on reasonable proxies for the potential applicant pool. The only such proxy identified in this case was the one proffered by petitioners. Petitioners showed that they received applications from persons residing in Alaska, the Pacific

while the non-cannery workers are 21 percent non-white—was the more convincing of the two. In ignoring this factual finding of the district court, the decision below conflicts with this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), as well as with the decisions of other courts of appeals, which have found that external labor market data effectively rebuts internal work force comparisons. See, e.g., *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 382 (1st Cir. 1980); *Clark v. Chrysler Corp.*, 673 F.2d 921, 929 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984).

<sup>8</sup> Moreover, one effect of holding that a *prima facie* disparate impact case is established by evidence of a mere work force imbalance would be to discourage employers from engaging in voluntary affirmative action. Any affirmative action that increases the percentage of minorities in some but not all job classifications might create the imbalance necessary for a disparate impact suit and, accordingly, employers would have great reason not to engage in affirmative action (as opposed to mere quota hiring) at all. The Court has said that Title VII should not be interpreted to create such disincentives against voluntary affirmative action. See *Johnson v. Transportation Agency*, 107 S. Ct. at 1450-51.



Northwest, and California. They further demonstrated through census data that, even without regard to the qualifications required for the non-cannery positions, the potential applicant pool in these states is only ten percent non-white; and that, by comparison, non-whites have filled 21 percent of their non-cannery positions and thus are over-represented in those positions. Only one conclusion follows: that petitioners' selection and employment practices have had no cumulative adverse impact on non-whites.

**III. AT THE REBUTTAL STAGE OF A DISPARATE IMPACT CASE, AN EMPLOYER NEED ONLY SHOW THAT ITS SELECTION DEVICES ARE REASONABLE IN LIGHT OF THE JOB AT ISSUE AND THE NATURE OF THE BUSINESS**

Having wrongly concluded that respondents established a prima facie case of discrimination, the court below exacerbated its error by concluding that, with two exceptions, petitioners had failed to meet their burden of showing that their employment practices were justified by business necessity. The court below not only placed too heavy a burden on petitioners—to “prove the job relatedness or business necessity of the practice” giving rise to the disparity (Pet. App. VI:5; emphasis added)—but it ignored substantial evidence that petitioners' practices were in fact so justified.

It is well-settled that a plaintiff in a Title VII case bears the “ultimate burden of proving a violation of Title VII.” *New York Transit Auth. v. Beazer*, 440 U.S. at 587 n.31. It is equally well-settled that a “prima facie showing is not the equivalent of a factual finding of discrimination.” *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978). Thus, while the employer in a prima facie disparate impact case—like the employer in a prima facie disparate treatment case—has a rebuttal burden, that burden is not one of persuasion; it is a burden of production. A violation of the statute is established—

satisfying the plaintiff's burden of persuasion—only when an *unjustified* practice has been shown disproportionately to exclude minorities, and that conclusion can be drawn only *after* the assessment of business necessity has been made. See *Griggs v. Duke Power Co.*, 401 U.S. at 431. Thus, requiring the employer to “prove” business necessity at the rebuttal stage—as the court below did—effectively converts the plaintiff's prima facie showing into an ultimate finding of discrimination. Neither the statutory language nor this Court's cases justify such a requirement.<sup>9</sup>

Nor is there any proper justification for the overly demanding standard that the court below applied in rejecting petitioners' explanations for their employment practices. To be sure, this Court has described the rebuttal burden in a disparate impact case as focusing on the “business necessity” for the challenged practice (*Griggs v. Duke Power Co.*, 401 U.S. at 431) and, on occasion, has suggested that, in particular circumstances, this burden may necessitate a formal validation study (see, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. at

<sup>9</sup> To be sure, in *Burdine*, this Court “recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes.” 450 U.S. at 252 n.5. But, although the “character of evidence presented” may differ, this does not mean that a plaintiff's burden of proof—to prove that he was a victim of discrimination—is any less in a disparate impact case. See *Watson*, 108 S. Ct. at 2785 (“Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination”); *Beazer*, 440 U.S. at 587 n.31. Indeed, it would be “illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus” (*NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1335 (3d Cir. 1981)), since “[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII” (*International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15).



431). But the Court has also held that an employer may satisfy his rebuttal burden with evidence that the selection process serves the "legitimate employment goals of safety and efficiency" (*New York Transit Auth. v. Beazer*, 440 U.S. at 587 n.31), and that such evidence need not take the form of a validation study (*see ibid.*). On the contrary, as a plurality of the Justices recently reiterated in *Watson*, a disparate impact claim is rebutted when the evidence shows that "employment practices are based on legitimate business reasons" (108 S. Ct. at 2790); that is, a disparate impact claim is rebutted by evidence "that the[] selection devices—test or nontest—are justified in light of the nature of the job and its relation to the overall enterprise. Face validity, otherwise known as reasonableness, should suffice." Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17, 39.

Petitioners plainly established the "face validity"—or reasonableness—of each of the practices challenged in this case. Petitioners showed, and the district court found, that they did not engage in nepotism at all. Pet. App. I:103-05. Petitioners also showed that the subjective job qualifications applied by petitioners were necessary for safe and effective performance of the non-cannery worker jobs. *Id.* at I:35-36, 40-41, 45-47, 107-114. Petitioners further showed that job openings were not posted because petitioners received more applications than they had openings, because they received applications from a multi-state region, and because cannery workers could apply in the off-season—just like everyone else—for non-cannery worker jobs. *Id.* at I:28-34. Finally, petitioners showed that petitioners' race-labeling practices had no effect on non-white employees' job opportunities and, furthermore, that petitioners' housing and messing practices were structured to accommodate workers' preferences, the arrival time and departure of workers, the costs of providing such benefits, and the

union's demands. *Id.* at I:123-29. These explanations were entirely reasonable in light of the jobs in issue and the nature of petitioners' business, and the court below erred in holding that petitioners had failed to meet their rebuttal burden.

Of course, had respondents offered evidence that petitioners could have accomplished their legitimate business goals and still avoided a disparate impact, the courts would have had to consider it. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790 ("the plaintiff must 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship'" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. at 425)). But respondents did not do so. They simply argued that petitioners could have increased the percentage of non-whites in their non-cannery jobs by, for example, training cannery workers and promoting them to non-cannery positions. This argument ignores, of course, the canneries' legitimate business reasons for not implementing such practices—i.e., the short and intense canning season, the infrequency of mid-season job vacancies, and the cost of providing such training. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790 ("[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant . . ."). But, more importantly, the argument rests on a misperception that Title VII requires employers to maximize their hiring of minority applicants.

This Court has made abundantly clear that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees" and that employers need not "pursue[] the course which would both enable [them] to achieve [their] own business goal[s] and allow [them] to consider the *most* employment applications." *Furnco Const. Corp. v. Waters*, 428 U.S. at

577-78 (emphasis in original). Any other conclusion would only invite courts to "require[] businesses to adopt what [they] perceive[] to be the 'best' hiring procedures" (*id.* at 578) and, as the plurality in *Watson* reiterated, "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it" (108 S. Ct. at 2791 (citation omitted)).

### CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

GLEN D. NAGER

(Counsel of Record)

ANDREW M. KRAMER

DAVID A. COPUS

PATRICIA A. DUNN

JONES, DAY, REAVIS & POGUE

1450 G Street, N.W.

Washington, D.C. 20005-5701

(202) 879-3939

*Attorneys for the*

*Chamber of Commerce of*

*the United States of America*

*Of Counsel:*

STEPHEN A. BOKAT

MONA C. ZEIBERG

NATIONAL CHAMBER

LITIGATION CENTER, INC.

1615 H Street, N.W.

Washington, D.C. 20062

(202) 463-5337

September, 1988

(5)  
No. 87-1387

Supreme Court, U.S.

FILED

SEP 9 1988

CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Ninth Circuit**

**BRIEF FOR THE AMERICAN SOCIETY FOR  
PERSONNEL ADMINISTRATION AS  
AMICUS CURIAE SUPPORTING PETITIONERS**

*Of Counsel:*

BREED, ABBOTT &  
MORGAN

\*LAWRENCE Z. LORBER  
J. ROBERT KIRK  
International Square  
1875 Eye Street, N.W.  
Suite 1000  
Washington, D.C. 20006  
(202) 466-1100

*Attorneys for Amicus Curiae,  
American Society for Personnel  
Administration  
(\*Counsel of Record)*

September 9, 1988



**QUESTIONS PRESENTED**

1. Should "disparate impact" plaintiffs be permitted to challenge facially neutral selection devices used to fill positions in one job category based only on statistics showing that plaintiffs are over-represented in a different job category?
2. In applying the disparate impact analysis, did the Ninth Circuit improperly alter the burdens of proof and engage in impermissible fact finding in disregard of established precedent of this Court?
3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of alleged employment practices under the disparate impact model?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
CONSENT TO FILING .....	1
INTEREST OF THE AMICUS CURIAE .....	1
STATEMENT OF FACTS .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	7
A. In the Wake of <i>Watson</i> , Employers Must Be Permitted To Judge The Personal Qualities Of Individual Job Applicants On A Case-By-Case Basis Without Being Saddled With Unmanageable Burdens .....	7
B. Justice O'Connor's Formulation Of Disparate Impact Analysis In <i>Watson</i> Is Based On Principles Essential To A Workable Application Of The Model .....	10
1. Because Statistical Imbalances Alone Do Not Support A Presumption Of Unlawful Discrimination, Evidence Of An Adverse Impact Must Be Linked To A Discrete Selection Criterion .....	10
2. The First and Third Questions Presented Should Be Resolved In Favor of Petitioners .....	15
C. Employers Should Not Bear the Burden Of Proving the Business Necessity of Nonstandardized Selection Criteria .....	19
1. By Their Very Nature, Nonstandardized Selection Criteria Are Not Amenable to the Techniques By Which the Job Relatedness Of Standardized Criteria Is Proven Or Disproven .....	21

2. The Plurality Opinion In <i>Watson</i> Outlines Evidentiary Standards Which Recognize the Special Nature Of Legitimate, Non-standardized Criteria .....	24
3. The Second Question Presented Ought To Be Resolved In Favor Of Petitioner .....	28
CONCLUSION .....	30

## TABLE OF AUTHORITIES

CASES:	Page
<i>AFSCME v. State of Washington</i> , 770 F.2d 1401 (9th Circuit 1985) .....	12
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	20,25
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) ..	17
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 34 E.P.D. ¶ 34,437 (W.D. Wash. 1983) .....	2,3,4,passim
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 768 F.2d 1120 (9th Cir. 1985) .....	4
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 810 F.2d 1477 (9th Cir. 1987) .....	4,16
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 827 F.2d 439 (9th Cir. 1987) .....	4,16,28,29
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	15,25
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	9,20,21,24
<i>Johnson v. Transportation Agency, Santa Clara County, California</i> , 480 U.S. —, 94 L.Ed.2d 615 (1987) .....	7,19
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	12,20,25
<i>Sheet Metal Workers v. EEOC</i> , 478 U.S. —, 106 S.Ct. 3019 (1986) .....	19
<i>Spaulding v. University of Washington</i> , 740 F.2d 686 (9th Cir. 1984) .....	15
<i>Steelworkers v. Weber</i> , 443 U.S. 193 (1979) .....	14
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) ..	21
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	14,20
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	24,25
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 56 U.S.L.W. 4922 (June 29, 1988), vacating 798 F.2d 791 (5th Cir. 1986) .....	5,7,9,passim

## Table of Authorities Continued

	Page
CONSTITUTION AND STATUTES:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. ....	3,passim
Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978) .....	21
MISCELLANEOUS:	
Bartholet, <i>Application of Title VII to Jobs in High Places</i> , 95 Harv. L. Rev. 945 (1982) .....	28



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

---

**No. 87-1387**

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

---

**On Writ Of Certiorari To The United States Court Of  
Appeals For The Ninth Circuit**

---

**BRIEF FOR THE AMERICAN SOCIETY FOR  
PERSONNEL ADMINISTRATION AS  
AMICUS CURIAE SUPPORTING PETITIONERS**

---

**CONSENT TO FILING**

This Amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

**INTEREST OF THE AMICUS CURIAE**

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel

and human resources professionals, representing over 40,000 members in business, government, and education dedicated to the advancement of personnel and human resource management. Accordingly, ASPA and its members have a keen interest in the development and enforcement of the myriad of laws and regulations which govern many aspects of employment.

As the major professional association of the human resources profession, ASPA is vitally concerned with the orderly evolution of laws defining, in practical terms, the meaning of equal employment opportunity. ASPA has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems. ASPA believes that the present case provides an excellent opportunity for this Court to reaffirm the appropriate balance between the compatible goals of providing equal employment opportunities and preserving the right of managers to make legitimate personnel judgments in the best interest of their organizations.

#### STATEMENT OF FACTS<sup>1</sup>

Respondents are persons of Chinese, Filipino, Japanese and Native American descent who have been employed in fish canning facilities owned by Petitioners in remote, widely separated areas of Alaska (1, 50). Most of the jobs at the canneries are seasonal and temporary and are filled by migrant workers (52, 119). Since summer salmon runs are very short and the fish are extremely perishable, it is

<sup>1</sup> Unless otherwise noted, each of the facts set forth herein is taken from the district court's findings of fact following a nonjury trial. *Atonio v. Wards Cove Packing Co., Inc.*, 34 E.P.D. ¶ 34,437 (W.D. Wash. 1983) (copy appended as Attachment 1 to Petition For Writ of Certiorari herein). References such as "(1, 50)" refer to the numbers of the district court's findings of fact.

essential that the canneries operate at peak production (51, 63). "The slightest mistake in calibrating can size or in retort [cooking] management, for example, could result in a threat of widespread botulism, a disease fatal to humans."<sup>2</sup>

There were two general categories of jobs at Petitioners' canneries. The first, referred to as "cannery" or "laborer" jobs, included production line positions. The second, referred to as "noncannery jobs," included all other departments (82). Most cannery worker jobs did not require employees who were literate or able to communicate effectively in the English language, and none required employees to be available prior to the short, summer salmon run (117). Most of the so-called "noncannery" jobs required both English literacy and early season availability (117). It is the "noncannery" jobs which are at issue in this lawsuit (82).

Respondents Title VII claim alleged unlawful discrimination on the basis of color in Petitioners' selection of employees for the at-issue, noncannery jobs. Cannery workers and laborers at Petitioners' facilities were predominately nonwhite. In these jobs, nonwhites were over-represented in comparison to the relevant labor supply (105, 107). In noncannery positions, the district court found that whites and nonwhites were employed in percentages which approximated their availability in the relevant labor supply (123). Nevertheless, Respondents contended that the difference in the percentage of nonwhites in cannery jobs versus noncannery jobs supported a finding of unlawful discrimination.

The district court disagreed. It found that many of the jobs at Petitioners' facilities were covered by union contracts, and that Local 37 of the I.L.W.U.—the membership of which was predominately Filipino—provided an over-

<sup>2</sup> *Atonio*, *supra* at fn.1, 34 E.P.D. at 33,840.

supply of nonwhites for cannery worker positions (84, 103). It found that Petitioners received relatively few applications for noncannery positions from nonwhites (89). It found experience in cannery positions did not qualify employees for noncannery jobs, that there was no opportunity for on-the-job training for skilled, noncannery jobs, and that Petitioners did not promote from within but filled positions by rehiring past employees or hiring new employees from the external labor market (57, 95, 97). In short, the district court found that Petitioners' "cannery workers and laborers do not form a labor pool for other jobs at [Petitioners'] facilities" (110).

The district court's opinion initially was affirmed on appeal<sup>3</sup> but later was reversed by the Ninth Circuit sitting *en banc*.<sup>4</sup> Upon rehearing, the original panel remanded the case to the district court with instructions to consider Respondents' evidence under the "disparate impact" model of employment discrimination.<sup>5</sup>

### SUMMARY OF ARGUMENT

Led by the human resources profession, American employers are firmly committed to providing equal employ-

<sup>3</sup> *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120 (9th Cir. 1985).

<sup>4</sup> *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*).

<sup>5</sup> *Atonio v. Wards Cove Packing Co., Inc.*, 827 F.2d 439 (9th Cir. 1987). The Court should note that while the district court believed "disparate impact" analysis should not be applied to all aspects of Respondents' claim, it took pains to state its opinion as to the "business necessity" of certain employment practices if "disparate impact" were applied. The district court concluded Respondents had failed to prove a "disparate impact" *prima facie* case or Petitioners had demonstrated "business necessity" with respect to (a) requiring English language literacy for noncannery workers, (b) word-of-mouth recruitment among relatives, (c) the rehire preference, (d) housing workers by department, and (e) feeding workers according to ethnic preferences. See *Atonio*, *supra* at fn.1, 34 E.P.D. at 33,840-844.

ment opportunities to people regardless of characteristics like color or gender. But in order to work effectively to further the goals of Title VII, employers must have a clear, operational definition of applicable legal rules. And those rules must not be so unworkable that the only practical alternative for employers is to operationalize "equal opportunity" by proportionate hiring of blacks, women and members of other protected groups.

In the wake of this Court's opinion in *Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. 4922 (June 29, 1988), vacating 798 F.2d 791 (5th Cir. 1986), employers are very uncertain about the practical, operational meaning of "disparate impact" theory as applied to review a series of individual, subjective personnel judgments. And they fear that the only manageable way to comply with this new rule will be to hire "by the numbers"—a result which would stand the purpose of Title VII on its head.

The Court should seize the opportunity offered by the present case to restate the rule of *Watson* in terms which provide employers a clear, operational definition of its requirements. Most importantly, those requirements must take into account the practical realities of countless personnel judgments made by fair-minded employers every single day. The Court should adopt the evidentiary standards outlined in the plurality opinion in *Watson* and spell them out in much greater detail, both with respect to the quality of a proper *prima facie* case and the nature of the intermediate burden to be carried by employers.

"Disparate impact" plaintiffs ought to be required to prove that a specific selection criterion disqualified a significantly disproportionate number of individuals because of their membership in a protected class. Where the challenge is directed at a series of subjective personnel judgments, requiring identification of a specific, discrete selection criterion is a particularly important part of the



foundation for a meaningful analysis. Here, Respondents' *prima facie* proof fell far short. Respondents failed to show they were excluded from the at-issue jobs—in fact, the record reflects no adverse impact at all. Instead, Respondents relied entirely on their over-representation in jobs not at issue. And Respondents failed to show that any specific selection device caused their over-representation in not at issue jobs or denied them the privilege of being over-represented in the jobs at issue. Instead, Respondents relied on a shotgun approach alleging that a legitimate difference in the percentage of nonwhites in at-issue and not at-issue jobs was the result of the "cumulative effect" of a variety of policies and practices. But Respondents never proved that this "statistical stratification" was caused by any particular selection device. Accordingly, the first and third questions presented should be resolved in favor of Petitioners.

Employers defending "disparate impact" challenges to their use of nonstandardized, subjective selection criteria should not bear an intermediate burden of proving the "business necessity" of those criteria. Unlike standardized selection devices, subjective judgments of important personal characteristics like loyalty or tact are not amenable to a *priori* testing to determine whether they will disqualify disproportionate numbers of protected individuals and, if so, to determine their relationship to business goals. Unless an employer's burden of proof could be satisfied simply by stating the opinion that the job relatedness of qualities like loyalty and tact is self-evident, such a burden would be unmanageable and would force employers into the untenable realm of proportional hiring. The Court must reject any evidentiary burden likely to produce this result.

## ARGUMENT

### A. In the Wake of *Watson*, Employers Must Be Permitted To Judge The Personal Qualities Of Individual Job Applicants On A Case-By-Case Basis Without Being Saddled With Unmanageable Burdens

It is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.

*Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. —, 94 L.Ed.2d 615, 636 n.17 (1987) (quoting Brief for ASPA as *Amicus Curiae* in support of Respondents).

As a corollary to the foregoing principle, personnel professionals also know that the business of selecting employees from a pool of well-qualified finalists is not a simple, mechanical process. Far from it. In order to identify individuals who will best serve the needs of their enterprises employers must approach the task with flexibility and creativity. The scarcity of perfect applicants means that each individual's strengths must be discounted by his or her weaknesses. Imperfect applicants must be judged in relation to one another and measured against the employer's reasonable definition of job requirements rather than measured against some external yardstick of perfection. At the same time, employers must be prepared to recognize and credit unique or outstanding qualities pre-

sented unexpectedly. While the process of final selection can be disciplined by advance thinking about the kind of individual who is likely to succeed, these prejudgments must often give way to new information, the qualities of available applicants and the pressures of time.

Indeed, in a "service economy" where intangible personal characteristics are often critical to the definition of a quality employee, a judge's selection of a law clerk is an excellent model for considering the practical dynamics of employee selection. Each candidate for a clerkship must possess certain minimum qualifications summarized by the fact that he or she has earned a degree from an accredited law school. Some judges may require one year or more of prior clerkship experience. But beyond these narrow, "objective" criteria, the judge's selection decision must be based on a series of subjective judgments about a wide range of factors. What was the quality of the candidate's law school, course selections and academic performance? How valuable was the candidate's prior clerkship experience? What is said by those recommending the candidate's selection and how much weight should be attributed to their views? Perhaps most importantly, what does the selecting judge see and hear when he or she looks into the eyes of a hopeful candidate during a final interview? Is there common sense, commitment and clear thinking or distant self-importance?

Well-qualified candidates almost always outnumber the positions available. Minimum qualifications are almost always satisfied. Choosing the clerk who will work most effectively with the selecting judge is of critical importance to the success of work in the upcoming term. What selection criteria will identify the very best clerk? Years later, will the selection decision be deemed illegitimate according to standards of equal employment opportunity which can be applied only after the total number of clerks selected is large enough to support a judgment about the significance of an overall statistical imbalance?

This Court's holding in *Watson v. Fort Worth Bank & Trust*, *supra*, (hereinafter "*Watson*"), changed those standards in ways which appear to be fundamental but which have not yet been fully revealed. Prior to *Watson*, selecting officials knew that candidates must not be treated differently because they are black or female or members of other protected groups. Employers knew they could not screen out candidates who, for example, lacked certain educational attainment or experience if those criteria excluded a disproportionate number of protected individuals but did not bear "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). But, prior to *Watson*, this Court had "consistently used conventional disparate treatment theory . . . to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." *Watson*, 56 U.S.L.W. at 4925. Accordingly, employers were confident of their freedom to judge the personal qualities of individual candidates as long as those judgments were not tainted by unlawful prejudice.

Since *Watson*, that freedom is in doubt. *Watson* held that, after a period of years, individual personnel judgments may be deemed unlawful if, viewed collectively, members of a protected group were selected less often than others. To return to our clerkship model, if a judge's hiring decisions over the years selected male candidates significantly less often than female candidates, rejected males would be entitled to relief in the absence of proof of the "business necessity" of the criteria which produced those results.

The *Watson* result troubles employers for two reasons. The first is the fact of great uncertainty about the standards which will govern a retrospective "disparate impact" analysis of a series of individual, subjective personnel judgments. The second is the prospect that, once defined clearly, those standards will prove unmanageable unless employees are chosen "by the numbers," thus avoiding



statistical imbalances that can trigger a "disparate impact" analysis.

The case before the Court requires a clear, operational definition of the new rule announced in *Watson*. Without one, employers face the chilling uncertainty of knowing that something called "disparate impact" theory may be applied to individual personnel judgments but not knowing whether they should act in accordance with the evidentiary standards set forth in the Court's plurality opinion or the fundamentally different view expressed in the concurring opinion authored by Justice Blackmun. ASPA urges the Court to spell out the rule of *Watson* in terms which provide clear guidance and which preserve the right of employers to make legitimate, subjective personnel judgments.

**B. Justice O'Connor's Formulation Of Disparate Impact Analysis In *Watson* Is Based On Principles Essential To A Workable Application Of The Model**

If the "disparate impact" approach may be used to challenge individual, subjective personnel judgments, ASPA urges the Court to adopt the evidentiary standards for such cases outlined in the plurality opinion in *Watson*. That opinion expresses important principles which, when properly applied, should permit a workable balance between legitimate employer discretion and the goal of equal employment opportunity.

**1. Because Statistical Imbalances Alone Do Not Support A Presumption Of Unlawful Discrimination, Evidence Of An Adverse Impact Must Be Linked To A Discrete Selection Criterion**

Justice O'Connor's discussion of evidentiary standards in *Watson* began by recognizing a problem inherent in Title VII challenges based on statistical disparities.

It is completely unrealistic to assume that unlawful discrimination is the sole cause of people fail-

ing to gravitate to jobs and employers in accord with the laws of chance. *It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.*

*Watson*, 56 U.S.L.W. at 4926 (citation omitted) (emphasis added). Indeed, Title VII expressly disclaims any requirement that employers prefer members of protected groups in order to avoid or compensate for numerical imbalances. 42 U.S.C. § 2000e-2(j).<sup>6</sup>

Since a statistical imbalance must be linked to a specific cause in order to have any meaning in a Title VII case, the first, crucial burden borne by a "disparate impact" plaintiff is "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Watson*, 56 U.S.L.W. at 4927. In other words, our hypothetical male clerkship candidate must not only show that disproportionately few males were chosen—a preliminary fact which itself is no evidence of unlawful discrimination—but must also identify specifically what his prospective judge did that caused the disqualification of more male clerks than was expected by chance. Unless the focus is narrowed in this way, no foundation exists on which to base a proper "disparate impact" analysis.

At this very first step of the analysis the rule intended by the Court in *Watson* can become blurred—and the bur-

<sup>6</sup> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of . . . have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection(j) is added to state this expressly." 110 Cong. Rec. S 12723 (daily ed. June 4, 1964), Statement of Senator Humphrey, reprinted in the EEOC's Legislative History of Title VII and XI of Civil Rights Act of 1964, at 3005.



den on employers can become unmanageable—in the absence of a clear definition of the category of selection devices which are proper targets of a disparate impact attack. The Court's opinions in *Watson* discuss the impact of employment "tests," "requirements" and "criteria," but also speak in terms of selection "practices," "procedures," and "systems." The former set of terms describes discrete selection devices which can be identified specifically and analyzed individually. The latter set describes aggregations of variables, each of which may include some factors which have had an impact on the selection of certain employees and other factors which have not.

"Disparate impact" analysis should only be applied to review discrete selection criteria which can be identified and analyzed individually. "Disparate impact" plaintiffs must not be permitted to challenge multifactor selection "procedures" or "systems" as if they were a single, indivisible "cause" of a statistical imbalance. See, e.g., *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); see also *AFSCME v. State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.")

The reasons for imposing such a limitation are obvious. Permitting a "shotgun" attack against an employer's overall selection system would render meaningless the requirement of showing a causal link between a particular selection device and an adverse impact. Because, as Justice O'Connor wisely observed, it would be "unrealistic to suppose that employers can . . . discover and explain, the myriad of innocent causes" that may have led to such a result, plaintiffs must bear the burden of identifying the specific criterion they believe caused unjust discrimination. *Watson*, 56 U.S.L.W. at 4926. For example, if our hypothetical male clerkship candidate could simply attack the collective impact of all the selection criteria used by the judge, it

would always be the case that somewhere among that universe of criteria would be the criterion which caused the adverse impact. Without specification of a discrete criterion, proof of causation would consist of nothing more than the simple claim that the judge's criteria caused the impact. Moreover, shotgun attacks would require employers to justify many—perhaps all—facets of their selection systems even if an adverse impact was the product of only one element of that system. No purpose would be served by requiring our hypothetical judge to demonstrate the "business necessity" of, for example, a preference for candidates from ivy league law schools or candidates with clinical experience if in reality it was the recommendations of law school professors that caused the selection of a disproportionate number of women.

Similarly, a "disparate impact" plaintiff should not be permitted simply to attack the general practice of making a final selection decision based on a personal interview, as if the interview itself was a selection criterion. Once again, the entire concept of a causal link between a specific selection device and some adverse impact would be rendered meaningless by this approach. The selection criterion that produced the impact may or may not have been among those applied during the interview. If it is not, analysis of the legitimacy of interviews as a selection device is completely useless. And even if the operative criterion was applied during the interview, analysis of the "business necessity" of the criterion cannot begin until it is identified. Instead of permitting plaintiffs to attack employers' judgments in a vague and general way, all of the criteria applied during personal interviews should be identified—a single interrogatory will accomplish this result—and courts should then require plaintiffs to show which of those criteria caused the numerical imbalance observed.

If an employer cannot identify the criteria it used to distinguish candidates, the "disparate impact" model of analysis should not be applied. This does not mean that

an employer with a standardless selection system would prevail. Rather, it simply means that the review of such an employer's selection decisions should proceed under the "disparate treatment" model.

Contrary to Justice Blackmun's concern that the lack of specific selection criteria might "shield [an employer] from liability," an employer's inability to articulate the basis for its selection decisions would leave it vulnerable to a variety of attacks. *Watson*, 56 U.S.L.W. at 4931, n.10 (Blackmun, J., concurring). Indeed, that inability may require a judgment against the employer if a "disparate treatment" plaintiff had made out a *prima facie* case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption [of unlawful discrimination], the court must enter judgment for the plaintiff because no issue of fact remains in the case."). If unable to identify its selection criteria, the employer may even be in a worse position than if, under the "disparate impact" model, it bore the onerous "burden of establishing that the absence of specified criteria was necessary for the proper functioning of the business." *Watson*, *supra*, at 4931 n.8. Thus, the appropriateness of the "disparate impact" approach does not turn on an unprincipled prediction about whether plaintiffs or employers are more likely to prevail. Rather, the important, enduring principle is that Congress never intended Title VII to require employers to adopt any external set of hiring criteria, much less an idealized set of "objective criteria carefully tailored to measure relevant job qualifications." *Watson*, 56 U.S.L.W. at 4931 (Blackmun, J., concurring). See, *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979) (Congress did not intend to limit traditional business freedom, even with respect to certain race-conscious affirmative action).

This Court has recognized "[t]he dangers of embarking on a course . . . where the court requires businesses to

adopt what it perceives to be the 'best' hiring procedures. . . ." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). Instead, Title VII enforcement should accept employers' selection devices for what they are and apply standards of review appropriate to test the legitimacy of the device chosen by the employer. If discrete tests or criteria have been used which systematically excluded protected individuals, "disparate impact" analysis may be applied in accordance with the rule of *Watson*. If no such tests or criteria can be identified, "disparate impact" analysis is not a useful tool and, instead of forcing employers to adopt judicially approved selection devices, their employment decisions should be reviewed under the "disparate treatment" approach.

## 2. The First and Third Questions Presented Should Be Resolved In Favor of Petitioners

A straightforward application of the foregoing principles requires that the first and third questions presented be answered in favor of Petitioners.

The third question presented should be addressed first because it goes to the heart of the problem—namely, that Respondents failed to show any causal link between a discrete selection device and a significant, disparate impact against minority applicants. Respondents simply alleged that the over-representation of minority employees in the *not at-issue*, cannery worker jobs resulted from the *cumulative* effect of a variety of employment practices.<sup>7</sup> Despite the Ninth Circuit's apparent recognition that the "disparate impact" model should *not* authorize a "wide ranging attack on the cumulative effect of a Company's employment practices." *Spaulding [v. University of Washington]*, 740 F.2d 686, 707 (9th Cir. 1984)], the court's *en*

<sup>7</sup> The insufficiency of this allegation, even if a causal link to a specific criterion were proven, is discussed immediately below. See, *infra*, at pp. 17-19.



*banc* opinion proceeded to hold that "practices which cause adverse impact may be considered individually and collectively." *Atonio, supra* at fn.4, at 1486 n.6 (emphasis added). On remand, the original panel applied this holding in a way which relieved Respondents of their proper evidentiary burdens and placed unmanageable burdens on Petitioners.

The statistics show only racial stratification by job category. This is sufficient to raise an inference that *some practice or combination of practices* has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs.

*Atonio, supra* at fn.5, at 444 (emphasis added).

The Ninth Circuit thus proceeded with its "disparate impact" analysis in the absence of proof of any causal link between an adverse impact and a specific selection device. This rule would mean that every employer with a disproportionately high number of protected individuals in any job category would be obligated to justify *every* selection device—even those used for different job categories—which plaintiffs might allege is somehow related to that numerical imbalance. The more employment practices plaintiffs indict, the more their employers must defend. And if the justification for any particular practice falls short, the employer would risk liability regardless of the actual adverse impact of that practice. In the present case, for example, Petitioners demonstrated the business necessity of their "rehire preference" to the satisfaction of both the district court and the Court of Appeals but nevertheless risk liability on the basis of practices with doubtful causal connections to the proportion of whites and nonwhites in various jobs—practices like referring to a fish butchering

machine by the name given it by its inventor (the "Iron Chink").<sup>8</sup>

The courts below erred in permitting a challenge based on cumulative effects and without proof of causation. That error should be reversed. With respect to the first question presented, the error of the lower courts was even more extreme.

This Court's plurality opinion in *Watson* restated the obvious point that a causal link must be established between a specific selection device and a significant impact which is *adverse* to protected individuals.

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the *exclusion* of applicants for jobs or promotion because of their membership in a protected group.

*Watson*, 56 U.S.L.W. at 4927 (emphasis added). Below, Respondents made no showing that any selection device caused the disproportionate exclusion of minorities from at-issue jobs. Indeed, the district court found that minorities were *not* under-represented in the at-issue jobs and that "in some instances, nonwhites are overrepresented in the jobs taken on a department-by-department basis." *Atonio, supra* at fn.1, 34 E.P.D. at 33,829 (finding of fact 123) (emphasis added).<sup>9</sup> Rather than demonstrating an adverse impact with respect to at-issue jobs, Respondents' entire case hung on their ability to treat the overrepresentation of minorities in *not* at-issue jobs as the proper

<sup>8</sup> See, *Atonio, supra* at fn.1, 34 EPD at 33,826 (finding of fact 65).

<sup>9</sup> This was one of numerous findings of fact not credited by the court below, a practice in direct conflict with this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).



foundation for a "disparate impact" analysis of devices used to select employees for different jobs.

Respondents' contorted approach makes a shambles of the theory on which they rely. "Disparate impact" theory demands some connection between specific employment devices and the hiring decisions produced by those devices—otherwise the indispensable element of causation is non-existent. The theory demands some demonstration of an impact that is adverse—otherwise the claim is properly one of reverse discrimination brought by a different set of plaintiffs. And the theory requires proof of an adverse impact with respect to jobs at issue—otherwise there would be no limit to the burden borne by employers. If adverse impact in one job category could be used to challenge the selection devices used for an entirely different job category, a showing of adverse impact *anywhere* in a facility would require proof of the "business necessity" of selection devices used *everywhere* in the facility. This would mean that even if our hypothetical judge selected male and female clerks in perfect proportion to their availability, the judge still would have to demonstrate the "business necessity" of every criterion used to select law clerks if, for example, he or she had employed a disproportionately high number of female secretaries.

The only conceivable rationale which may have led the Ninth Circuit to rely on the overrepresentation of nonwhites in one job category to require proof of the "business necessity" of criteria used to select employees in a different category in which nonwhites were *not* underrepresented—and it would have been a twisted, faulty rationale—would have been a rationale suggesting that the high percentage of nonwhite cannery workers defined the "expected" percentage of nonwhites among noncannery workers. If this was the rationale, it was flat wrong. The district court specifically found that the two categories of jobs required different sets of skills and qualifications and that cannery workers were *not* part of the available labor

pool for noncannery jobs.<sup>10</sup> This Court has held consistently that legitimate expectations about minority representation in particular job categories depend on the availability of individuals with the qualifications for the jobs in question.

[A]nalysis of a more specialized labor pool normally is necessary in determining under-representation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of qualified minority applicants . . ." *Sheet Metal Workers v. EEOC*, 478 U.S. \_\_\_, 106 S.Ct. 3019 (1986) (O'Connor, J., concurring in part and dissenting in part).

*Johnson v. Transportation Agency, supra*, 94 L.Ed.2d at 633.

As a matter of law, statistical evidence showing a numerical imbalance among employees filling one category of jobs cannot support a "disparate impact" assault on devices used to select employees for a different category of jobs. Accordingly, the first question presented should be decided in favor of Petitioners.

### C. Employers Should Not Bear the Burden Of Proving the Business Necessity of Nonstandardized Selection Criteria

Prior to *Watson*, it was sometimes said that a distinguishing feature of "disparate treatment" and "disparate

<sup>10</sup> *Atonio, supra* at fn.1, (findings of fact 117 and 110). Once again, the failure to credit these findings cannot be justified. See, *Anderson v. Bessemer City, supra* at fn.9.

impact" analysis was the nature of the intermediate burden on the employer once a plaintiff made out a *prima facie* case. In a "disparate treatment" context, the employer's intermediate burden is not a burden of proof but rather a burden of "articulation"—to explain clearly the nondiscriminatory reasons for its actions. *Burdine, supra*, at 255 n.9 and 260. In "disparate impact" cases challenging standardized selection criteria, this Court has characterized the employer's intermediate burden variously as one of "showing"<sup>11</sup> or "demonstrating"<sup>12</sup> or "establishing"<sup>13</sup> or "proving"<sup>14</sup> that its criterion bears "a manifest relationship to the employment in question."<sup>15</sup>

Now that *Watson* has opened an entire new category of employer activity to "disparate impact" review, characterizations of the employer's intermediate burden arising in other contexts should not be applied automatically to this new category of cases. As discussed below, because of a fundamental difference between evidence available to employers to justify standardized versus nonstandardized criteria, the employer's intermediate burden should not rise to the level of a burden of proof by a preponderance of the evidence. Where "disparate impact" theory is applied to nonstandardized, subjective personnel judgments, employers should bear an intermediate burden of production similar to that in a "disparate treatment" case. In these new cases, the intermediate burden on employers should be to produce evidence of a "manifest relationship" between their nonstandardized criterion and a legitimate business need.

<sup>11</sup> *Griggs, supra*, at 432.

<sup>12</sup> *Beazer, supra*, at 587.

<sup>13</sup> *Id.*, at 587 n.31.

<sup>14</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

<sup>15</sup> *Griggs, supra*, at 425.

**1. By Their Very Nature, Nonstandardized Selection Criteria Are Not Amenable to the Techniques By Which the Job Relatedness Of Standardized Criteria Is Proven Or Disproven**

In a "disparate treatment" case, the ultimate issue is whether a selecting official intended to discriminate against an individual based on his or her membership in a protected class. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The intent to discriminate is, of course, something the decision maker knows about at the time an employment decision is made. Discriminatory intent can be recognized and abandoned by decision makers seeking to comply with the law. In short, the "disparate treatment" approach embodies standards which leave no doubt about what the law requires and afford employers the opportunity to judge their behavior at the time an employment decision is made and to conform it to the law.

Similarly, in a "disparate impact" case challenging a standardized selection device—one, as in *Griggs*, which systematically disqualified a disproportionate number of protected individuals—an employer is able to assess its position before the device is actually used. By definition, a standardized selection device is one which will apply precisely the same measure in precisely the same way to as many candidates as necessary. A standardized device, therefore, can be tested prior to its implementation to determine whether it will impact adversely members of a protected group. If such an impact is observed, it can also be tested to determine whether it is a reasonably good predictor of success on a job or is otherwise justified by "business necessity." Accordingly, employers can assess a standardized device *a priori* and decide whether to implement or abandon it. Indeed, the federal government has regulated this process for many years by means of guidelines instructing employers on how to carry out this assessment. See, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).



However, an employer judging important personal qualities of individual applicants based on nonstandardized, subjective criteria is in a fundamentally different position. By definition, nonstandardized devices—for example, judgments during an interview about a candidate's loyalty or tact—do not apply precisely the same measure in precisely the same way time after time. No matter how detailed the guidelines, different interviewers will have somewhat different notions of the meaning of nonstandardized criteria like loyalty and tact. The words they use to test these attributes will vary in subtle ways. Their assessments will depend to some extent on the course and content of conversation during the interview. Judgments may vary depending on whether the conversation stumbles into complex or controversial topics, whether the prior interviewee seemed wonderful or impossible, whether the interviewer is eager to meet a potential employee or is bored with a lengthy selection process, and a host of other uncontrolled variables.

Under these circumstances, it would impose an unmanageable burden on employers to require them to *prove* that a nonstandardized criterion like loyalty or tact was essential to good performance on the job. For example, even if our hypothetical judge in search of a law clerk had the time to “pre-test” his or her judgments of loyalty and tact on a group of one hundred law school graduates to determine whether an adverse impact would result, that exercise would be of precious little value because the judge could not control the application of those nonstandardized criteria to the next one hundred candidates so as to be confident that the results would be the same.

Moreover, how would our judge prove the “business necessity” of qualities like loyalty or tact? Since judgments of nonstandardized criteria cannot be quantified with confidence, it would be impossible to construct a meaningful historical record which compared a clerk's loyalty or tactfulness “scores” to other scores rating the clerk's job per-

formance.<sup>16</sup> If the judge had consistently hired clerks based, in part, on an assessment of their loyalty and tact, the only way to prove the necessity of these criteria would be to abandon them and watch for demonstrably inferior performance by those newly hired.<sup>17</sup>

The practical impossibility of constructing a meaningful proof of the job relatedness of nonstandardized selection criteria contrasts sharply with the practical necessity of proving the job relatedness of standardized tests. The only way for employers to demonstrate the job relatedness of paper and pencil tests is by means of some form of validation study. Assuming the study is not itself defective, its results will constitute proof, at a stated level of confidence, that the test is either related to the jobs in question or that it is not. The all-or-nothing quality of the results of such studies shrinks to the vanishing point the

<sup>16</sup> Constructing such a record would be made even more difficult by the need to create a standardized measure to rate the quality of a clerk's performance. As the plurality pointed out in *Watson*:

[S]uccess at many jobs in which such qualities [including loyalty and tact] are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling.

*Watson*, 56 U.S.L.W. at 4926.

<sup>17</sup> Even this approach is only a theoretical, impractical possibility because (1) criteria like loyalty, tact and so on would have to be abandoned only one at a time in order to test the effect of each on performance, and (2) such a series of tests could not be completed in time to respond to a “disparate impact” challenge, particularly if only a small number of clerks were hired each year.

It should be noted that each of the practical problems faced by our hypothetical judge would be multiplied dramatically in the context of a large employer with a large number of selecting officials, each doing his or her best to judge critical personal qualities of a variety of applicants.



difference between a burden of producing evidence and a burden of proof. Thus, in the case of standardized selection devices, it is understandable that courts have sometimes required "proof" rather than "evidence" of job relatedness.<sup>18</sup>

Reasonably available evidence of the job relatedness of subjective, nonstandardized criteria typically will be suggestive rather than dispositive. In many cases, to impose a burden of proof of "business necessity" with respect to this category of selection criteria would be to outlaw them. In mandating equal employment opportunity, Congress never intended to outlaw the use of business judgment in hiring or impose unmanageable burdens on employers to justify judgments not tainted by an intent to discriminate against members of protected groups.

## 2. The Plurality Opinion In *Watson* Outlines Evidentiary Standards Which Recognize the Special Nature Of Legitimate, Nonstandardized Criteria

In light of the practical dilemmas that would be faced by employers forced to prove the business necessity of subjective personnel judgments, the plurality in *Watson* interpreted the "manifest relationship" test of *Griggs* in a way that was perfectly appropriate. The plurality opinion properly rejected the notion that the *Griggs* test "impl[ies] that the ultimate burden of proof can be shifted to the defendant." *Watson*, 56 U.S.L.W. at 4927. Instead, the plurality opinion limited the intermediate burden on employers in cases of this type to a burden of production.

<sup>18</sup> ASPA does not mean to cast doubt on the plurality's important observation in *Watson* that this Court has never required employers to "introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson*, 56 U.S.L.W. at 4928 (emphasis added). As the plurality illustrated with examples including *Washington v. Davis*, 426 U.S. 229, 250 (1976), the ability of a test to predict actual on-the-job performance is not a necessary element of the Court's definition of either test validity or job relatedness. See also, *Id.*, at 256 (Stevens, J., concurring).

Thus, when a plaintiff has made out a *prima facie* case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.

*Id.* (citing *Albemarle Paper Co.*, *supra*). The plurality concluded that imposing a greater intermediate burden on employers would be to require more—in the case of nonstandardized criteria not amenable to objective proof—than the Court had required in other contexts. See *New York City Transit Authority v. Beazer*, *supra* (methadone users properly excluded from nonsafety-sensitive jobs based on simple articulation of rationale for personnel policy); *Washington v. Davis*, *supra* (written test justified by simple rationale that test which predicted success at police training academy was "manifestly related" to police work despite absence of demonstrated link between test and actual performance as a police officer).

The plurality was also correct in recognizing that:

[i]n the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.' It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.

*Watson*, 56 U.S.L.W. at 4928 (quoting *Furnco*, *supra*, at 578). This conclusion simply recognized that, unlike complicated paper-and-pencil examinations, the job relatedness

of certain nonstandardized criteria is apparent on their face. Compare the process for analyzing the job relatedness of a standardized written exam and a nonstandardized criterion like tactfulness. There is no way to draw an immediate conclusion about the job relatedness of a ten page test booklet containing dozens of questions. First, one must ask what knowledge did those questions seek? Was the format bilingual or did it automatically exclude non-English speaking people of color? What was the relationship, if any, between the subject matter of each question or the totality of the questions and the job at issue?

By contrast, there is nothing complicated or indirect about judging the "manifest relationship" between a personal quality like tactfulness and any position in which an employee is obligated to work with other people. This is a matter that can be judged as soon as the criterion and the position are identified. While some may quibble about just how important it is to employ a person with tact rather than a person who is rude, the relationship between the criterion and the work is self-evident.

Justice Blackmun's response to the plurality opinion on this point is misguided. Justice Blackmun wrote:

It would make no sense to establish a general rule whereby an employer could more easily establish business necessity for an employment practice, which left the assessment of a list of general character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications. Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities.

*Watson*, 56 U.S.L.W. at 4931 (footnote omitted).

In fact, it does make sense that an employer who chooses to implement a relatively complicated, standardized paper-and-pencil test may have some difficulty explaining the relationship between that test and good performance. It does make sense that the Duke Power Company had more difficulty showing the business necessity of its written qualifying exam than it would have had explaining why it wanted employees with common sense or ambition or any other personal quality the value of which is self-evident. Some employers may choose to shoulder a heavier burden because use of a standardized device has special value in their particular circumstances—for example, as a rough screen for large batches of applicants too numerous to interview. The plurality opinion in *Watson* simply recognized that relatively sophisticated, standardized selection devices may require analyses of job relatedness that are more sophisticated than those required for common sense, subjective criteria.

Justice Blackmun's complaint also seems to ignore some compelling realities of employee selection. As a practical matter, employers are not able to choose freely between selection devices which are "objective" and "neutral" and those which are "subjective" and "discretionary." Certain personal qualities "have never been considered amenable to standardized testing." *Watson*, 56 U.S.L.W. at 4928. If employers are to assess these qualities—and, of course, they must—they must not be saddled with unmanageable risks. Justice Blackmun's approach failed to address in a practical way how employers would manage an intermediate burden of proof of the "business necessity" of non-standardized criteria. He cited an *amicus* brief filed by the American Psychological Association in support of Ms. *Watson* suggesting that such criteria are amenable to "psychometric scrutiny" but did not explain how such scrutiny would work and did not recognize the great expense of such a program if, indeed, it is workable at all. Justice Blackmun's approach did not deal with the likelihood that



employers would be forced to avoid the expense and burden of psychometrics by simply hiring "by the numbers." In fact, Justice Blackmun relied on Professor Bartholet's discussion of the feasibility of validating nonstandardized assessments, a discussion in which Professor Bartholet recognized that "quota or racially proportionate hiring" may be the result and, indeed, concluded that racially proportionate hiring "seems an appropriate solution." Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1026-7 (1982).<sup>19</sup>

### 3. The Second Question Presented Ought To Be Resolved In Favor of Petitioners

On remand from the decision *en banc*, the Ninth Circuit panel cited Respondents' allegation that "the lack of objective job qualifications and the consequent hiring on the basis of subjective evaluations has an adverse impact on nonwhites in the canning industry." *Atonio*, *supra* at fn. 5, at 446. The panel's discussion of this claim, however, is somewhat confusing in that it appears to direct the district court to "analyze whether these qualifications were actually applied in a nondiscriminatory manner." *Id.* This

<sup>19</sup> We believe that the minority opinion in *Watson* was particularly misguided in suggesting that the "business necessity" of a selection device may be disproven by evidence that, in a particular case, it "failed in fact to screen for the qualities identified as central to successful job performance." *Watson*, 56 U.S.L.W. at 4930 n.6. The opinion noted that one of Ms. Watson's competitors, Mr. Kevin Brown, performed poorly after he was selected for the position sought by Watson. Such anecdotal evidence should carry no weight in judging the legitimacy of a selection device. The legitimacy of a college-degree requirement, for example, should be unaffected by the fact that a particular college graduate failed in a job after being selected over someone without a college degree. Standing alone, an individual performance says nothing about whether the selection device was legitimate or effective. The rejected nondegree candidate may have failed in the job much more quickly or seriously. An effective selection device promises to be successful in the long run—it does not guarantee successful performance by each and every employee selected.

appears to be an analysis appropriate to a "disparate treatment" case. Yet, the panel's discussion of subjective criteria closed with the statement "[f]inally, and most importantly, the court must make findings as to the job-relatedness of the criteria actually applied." *Id.*

Despite this apparent confusion, one thing is clear. If the challenged practice of using subjective selection criteria is analyzed below according to the theory of "disparate impact," the Ninth Circuit has held that Petitioners must "prove the job relatedness or business necessity of the practice." *Id.*, at 442. In fact, Petitioners should never have to address the issue of business necessity because, as discussed in Section B above, Respondents have neglected their *prima facie* burden of proving a causal link between a specific subjective criterion and a significant adverse impact.

Nevertheless, if this matter is remanded for any purpose which may implicate the matter of Petitioners' intermediate burden, this Court ought to issue clear instructions. If the subject of Respondents' "disparate impact" challenge is a nonstandardized, subjective selection criterion, Petitioners' intermediate burden should be to produce evidence of a "manifest relationship" between that criterion and a legitimate business need.



**CONCLUSION**

For all of the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:  
Breed, Abbott &  
Morgan

\*Lawrence Z. Lorber  
J. Robert Kirk  
International Square  
1875 Eye Street, N.W.  
Suite 1000  
Washington, D. C. 20006  
(202) 466-1100

*Attorneys for Amicus Curiae,  
American Society for Personnel  
Administration*  
(\*Counsel of Record)

September 9, 1988

(b)  
No. 87-1387

Supreme Court, U.S.

FILED

SEP 9 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,  
*Petitioners,*  
v.

FRANK ATONIO, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

---

**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF THE PETITIONERS**

---

ROBERT E. WILLIAMS  
DOUGLAS S. McDOWELL  
EDWARD E. POTTER, P.C.\*  
McGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for the Amicus Curiae  
Equal Employment Advisory  
Council*

\* Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF THE AMICUS CURIAE .....	1
STATEMENT OF THE CASE .....	4
SUMMARY OF ARGUMENT .....	8
ARGUMENT .....	9
I. THE DISPARATE IMPACT THEORY OF TITLE VII MAY BE USED ONLY WHERE A SPECIFIC, FACIALLY NEUTRAL EMPLOYMENT PRACTICE OR CRITERION APPLYING TO A GROUP OF EMPLOYEES IS SHOWN TO CAUSE AN ADVERSE IMPACT ON A PROTECTED CLASS OF EMPLOYEES..	9
A. This Court has Applied the Disparate Impact Theory Only in Cases Challenging Specific, Facially Neutral Employment Practices or Criteria When the Plaintiff Has Shown a Direct Link Between Those Practices or Criteria and Adverse Impact on a Group of Employees .....	10
B. Numerous Well Reasoned Decisions of Courts of Appeals Have Held That The Disparate Impact Theory Is Limited To Claims Involving The Application Of Specific, Facially Neutral Employment Practices Or Criteria, Because Only In Such Cases Is It Possible To Demonstrate A Causal Connection Between A Particular Practice Or Criterion And Adverse Impact On Protected Employees .....	15



## TABLE OF CONTENTS—Continued

## Page

II. REQUIRING A DEFENDANT TO PROVE THE BUSINESS NECESSITY OF ITS PRACTICES AFTER A <i>PRIMA FACIE</i> CASE HAS BEEN ESTABLISHED—THAT IS, SHIFTING THE BURDEN OF PERSUASION TO THE EMPLOYER—INTERFERES WITH TRADITIONAL MANAGEMENT PREROGATIVES AND, IN EFFECT, MEANS THAT EMPLOYERS MUST ADOPT EITHER “BEST” HIRING PRACTICES OR QUOTAS, CONTRARY TO THIS COURT’S HOLDINGS IN <i>WATSON</i> , <i>FURNCO</i> AND <i>BURDINE</i> .....	20
CONCLUSION .....	28

## TABLE OF AUTHORITIES

## Cases

## Page

<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	11, 27
<i>American Fed. of State, County, and Municipal Employees v. State of Washington</i> , 770 F.2d 1401 (9th Cir. 1985) .....	13
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 768 F.2d 1120 (9th Cir. 1985), <i>cert. denied</i> , 108 S.Ct. 1293 (9th Cir. 1987) .....	6, 12, 17, 18
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 810 F.2d 1477, <i>cert. denied</i> , 108 S.Ct. 1293 (9th Cir. 1987) .....	3, 6, 7, 16, 19
<i>Atonio v. Wards Cove Packing Co., Inc.</i> , 827 F.2d 439 (9th Cir. 1987) .....	7
<i>Bazemore v. Friday</i> , 106 S.Ct. 3000 (1986) .....	3
<i>Blake v. City of Los Angeles</i> , 595 F.2d 1367 (9th Cir. 1979), <i>cert. denied</i> , 446 U.S. 928 (1980) .....	27
<i>Carroll v. Sears, Roebuck &amp; Co.</i> , 708 F.2d 183 (5th Cir. 1983) .....	16, 18, 19
<i>Chrisner v. Complete Auto Transit, Inc.</i> , 645 F.2d 1251 (6th Cir. 1981) .....	26
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	3, 8, 12, 13, 26
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	11
<i>EEOC v. Kimbrough Investment Co.</i> , 703 F.2d 98 (5th Cir. 1983) .....	26
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	3, 11, 12, 23, 24, 25
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976) .....	11
<i>Green v. USX Corporation</i> , 843 F.2d 1511 (3d Cir. 1988), <i>petition for cert. pending</i> , (88-141) .....	3
<i>Griffin v. Board of Regents of Regency Universities</i> , 795 F.2d 1281 (7th Cir. 1986) .....	18
<i>Griffin v. Carlin</i> , 755 F.2d 1516 (11th Cir. 1985) .....	16
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	10, 11, 16, 20, 24
<i>Hazelwood School District v. United States</i> , 433 U.S. 299 (1977) .....	14

## TABLE OF AUTHORITIES—Continued

	Page
<i>Hill v. Western Electric Co., Inc.</i> , 596 F.2d 99 (4th Cir. 1979) .....	15
<i>Hilton v. Wyman-Gordon Co.</i> , 624 F.2d 379 (1st Cir. 1980) .....	14
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	2, 3, 9, 14
<i>Kirby v. Colony Furniture Co., Inc.</i> , 613 F.2d 696 (8th Cir. 1980) .....	26, 27
<i>Latinos Unidos de Chelsea En Accion v. Secretary of Housing and Urban Development</i> , 799 F.2d 774 (1st Cir. 1986) .....	16
<i>Lee v. Washington County Bd. of Educ.</i> , 625 F.2d 1235 (5th Cir. 1980) .....	15
<i>Maddox v. Claytor</i> , 764 F.2d 1539 (11th Cir. 1985) .....	8, 16
<i>Mazus v. Department of Transportation of Pennsylvania</i> , 629 F.2d 870 (3d Cir. 1980), <i>cert. denied</i> , 449 U.S. 1126 (1981) .....	14
<i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136 (1977) .....	11
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	11, 14, 19
<i>Pack v. Energy Research and Development Administration</i> , 566 F.2d 1111 (9th Cir. 1977) .....	15
<i>Pettway v. American Cast Iron Pipe Co.</i> , 494 F.2d 211 (5th Cir. 1974), <i>cert. denied</i> , 467 U.S. 1243 (1984) .....	27
<i>Pope v. City of Hickory, North Carolina</i> , 679 F.2d 20 (4th Cir. 1982) .....	17
<i>Pouney v. Prudential Insurance Co.</i> , 668 F.2d 795 (5th Cir. 1982) .....	3, 8, 15, 17, 18
<i>Robinson v. Polaroid Corp.</i> , 732 F.2d 1010 (1st Cir. 1984) .....	16, 18
<i>Spaulding v. University of Washington</i> , 740 F.2d 686, (9th Cir.), <i>cert. denied</i> , 469 U.S. 1036 (1984) .....	15, 16
<i>Ste. Marie v. Eastern Railroad Association</i> , 650 F.2d 395 (2d Cir. 1981) .....	14

## TABLE OF AUTHORITIES—Continued

	Page
<i>Talley v. United States Postal Service</i> , 720 F.2d 505 (8th Cir. 1983), <i>cert. denied</i> , 466 U.S. 952 (1984) .....	16
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	3, 25
<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553 (1971) .....	3
<i>United States v. Bethlehem Steel Corp.</i> , 446 F.2d 652 (2d Cir. 1971) .....	26
<i>United States Postal Service Board of Governors v. Aikens</i> , 460 U.S. 711 (1983) .....	3
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979) .....	24
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 108 S.Ct. 2777 (1988) .....	2, 3, 6, 8, 9, 12, 13, 19, 23, 25
<i>Statutes</i>	
Civil Rights Act of 1964, Title VII, <i>as amended</i> , 42 U.S.C. 2000e, <i>et seq.</i> .....	2, 5
Section 703(a)(2); 42 U.S.C. § 2000e-2(a)(2) .....	10
Civil Rights Act of 1866, 42 U.S.C. § 1981 .....	5
<i>Rules and Regulations</i>	
Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 <i>et seq.</i> .....	20, 22, 26, 27
<i>Congressional History</i>	
122 Cong. Rec. 22950 (daily ed. July, 1976) .....	22
H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963) U.S. Code Cong. & Admin. News 1964, at 2391 .....	24
<i>Miscellaneous</i>	
Balleu, <i>Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection</i> , 36 Emory L.J. 203 (1987) .....	22

## TABLE OF AUTHORITIES—Continued

	Page
Bureau of National Affairs, <i>Recruiting and Selection Procedures</i> , PF Survey No. 146 (May 1988) .....	21
Daily Lab. Rep. (BNA) D-14 (Dec. 5, 1978) .....	22
Gwartney, Ashner, Haworth, Haworth, <i>Statistics, the Law and Title VII: An Economist's View</i> , 54 Notre Dame L. Rev. 633 (1979) .....	21, 22
National Research Council, <i>Ability Tests: Uses, Consequences and Controversies</i> (1982) .....	22
Potter, <i>Employee Selection: Legal and Practical Alternatives to Compliance and Litigation</i> (1986) .....	22
Rutherglen, <i>Disparate Impact Under Title VII: An Objective Theory of Discrimination</i> , 73 Va. L. Rev. 1297 (1987) .....	25
Schlei and Grossman, <i>Employment Discrimination Law</i> , at 1329 (1983) .....	26

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

\_\_\_\_\_  
No. 87-1387  
\_\_\_\_\_

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,  
v.                      *Petitioners,*

FRANK ATONIO, *et al.*,  
\_\_\_\_\_  
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit**

\_\_\_\_\_  
**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF THE PETITIONERS**  
\_\_\_\_\_

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as amicus curiae in support of the Petitioners. The parties' written consents have been filed with the Clerk of this Court.

**INTEREST OF THE AMICUS CURIAE**

The EEAC is an association of employers organized to promote sound, practical approaches to equal employment opportunity and affirmative action. Its membership comprises a broad segment of the employer community in the United States, including about 190 large employers and trade and industry associations located throughout the country. Its governing body is a Board of Directors



composed of experts in equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, the statute at issue in this case, as well as other equal employment statutes and regulations. Last term, in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), this Court expanded the applicability of the disparate impact theory to subjective criteria and practices involving an individual plaintiff. A plurality of the Court suggested an analytical framework for applying the disparate impact theory in such cases. This case presents the first opportunity for the full Court to apply and clarify the *Watson* decision in the context of a class action under Title VII. As a result, EEAC's members are vitally interested in the issues before the Court in this case, which concern the proper use of statistics and the burdens of proof under the disparate impact theory when the employer selects skilled and unskilled employees from different labor markets using multiple, subjective and objective criteria and practices.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Court stated that, in appropriate circumstances, either a disparate treatment or disparate impact theory may be applied to a particular set of facts. With respect to the use of statistics in class actions to establish a *prima facie* case, lower courts, including the Ninth Circuit, have failed to take into account the different purposes of the two theories. The Court in this case has an opportunity to make clear that the same set of statistics may not necessarily establish disparate treatment and impact in a particular case.

That is, although statistical disparities may sometimes be probative of disparate treatment, they are not probative of disparate impact unless a causal connection is shown between the disparities and some specific, facially neutral employment practice.

Furthermore, in *Watson* a majority of the Court recognized the difficulties of validating subjective selection criteria and a plurality of the Court stated that the employer's rebuttal burden is to state a legitimate business reason. For the benefit of Title VII litigants and the lower courts, this Court should clearly adopt the *Watson* plurality's discussion of the defendant's rebuttal burden in a disparate impact case, and should make clear that it is the same for both objective and subjective criteria.

EEAC has filed amicus curiae briefs in numerous cases concerning the appropriate use of statistics and the applicability of the disparate impact theory to subjective criteria. See *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988); *Atonio v. Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987) (en banc); *Green v. USX Corporation*, 843 F.2d 1511, (3d Cir. 1988), *pet. for cert. pending* (No. 88-141); and *Pouncey v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982). EEAC also has filed several briefs amicus curiae in this Court in cases involving burden of proof and statistical issues. See, e.g., *Bazemore v. Friday*, 106 S. Ct. 3000 (1986); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

### STATEMENT OF THE CASE

The defendant companies operate five canneries located in remote and widely separated areas of Alaska. The canneries are open only for a short period of time during the salmon runs each summer and are vacant the rest of the year. Skilled workers are brought in prior to the fishing season to assemble canning equipment, repair winter damage to the facilities and otherwise prepare the entire cannery for the season. They are retained during and after the season to maintain and disassemble equipment. The trial court found there was too little time during the preseason to train unskilled workers for these skilled jobs, because the work is intense and involves extensive overtime. Pet. for Cert. I-18-19. The unskilled cannery workers, who comprise most of the summer work force, arrive shortly before the fishing begins and remain at the cannery as long as there are fish to be canned. Because salmon are very perishable, the canneries operate virtually around the clock during fishing season.

Hiring for all jobs except for some cannery workers living in Alaska occurs at the defendants' home offices in Seattle, Washington and Astoria, Oregon during the first three months of the year. Many of the jobs at the defendants' facilities are covered by union contracts which have rehire preference clauses. The defendants receive many more applications than there are vacancies for the upcoming season. The district court found that the majority of the applicants for skilled positions were whites, and relatively few non-whites applied for those positions. *Id.* at I-31-32. It also concluded that, because of the sparse population in Alaska, it would not be reasonable from a business standpoint to seek applicants there for skilled jobs. *Id.* at I-32. Unskilled cannery jobs are filled through rehire preferences or through the dispatch procedure of a Filipino union local in Seattle, and workers performing those jobs are predominantly non-white. The

trial court also found that the skills acquired in most cannery worker jobs did not provide training for skilled jobs. *Id.* at I-40.

The plaintiffs brought a class action against the Petitioner companies alleging disparate treatment and impact under Title VII of the 1964 Civil Rights Act, *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Specifically, they claimed that as unskilled cannery workers, they were discriminated against in hiring and promotion to skilled jobs, as well as with respect to the companies' housing and messing practices. In a wide-ranging attack, the plaintiffs identified 16 practices which they asserted caused a concentration of nonwhites in the cannery positions, including English language skill requirements and nepotism. In addition to anecdotal evidence, they attempted to support their claims of disparate treatment and impact with two kinds of general statistical evidence—(1) comparisons between the racial composition of the defendants' skilled jobs and the racial composition of the available external labor supply, and (2) comparisons between the racial composition of defendants' skilled jobs and the racial composition of the defendants' unskilled jobs.

With respect to the allegations of disparate treatment, the trial court concluded that the plaintiffs had not proved the individual instances of discrimination and accorded the plaintiffs' statistics little probative value because they did not reflect the pool of employees who had the requisite skills or who were available for preseason work. The district court applied a disparate impact analysis to the English language requirement and nepotism claims, and found for the defendants. It declined to apply the disparate impact theory to subjective criteria and practices.

On appeal, a Ninth Circuit panel in *Atonio I* affirmed the decision of the lower court. In particular, it held that:



[P]ractices and policies such as a lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination. Consequently, we hold that disparate impact analysis was correctly withheld by the district court when considering these claims.

*Atonio v. Wards Cove Packing Company*, 768 F.2d 1120, 1133 (9th Cir. 1985).

Thereafter, the case was presented for *en banc* review. Consistent with this Court's subsequent decision in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), the *en banc* panel in *Atonio II* held that:

[D]isparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class. The three elements of the plaintiffs' prima facie case are that they must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection criteria and (3) show the causal relationship between the identified practices and the impact.

810 F.2d 1477, 1482 (9th Cir. 1987). Significantly, a concurring opinion stressed that the disparate impact theory is designed to be applied to certain types of cases only, and that the disparate treatment and impact theories may not be used interchangeably in any given fact situation. *Id.* at 1486-1494.

Contrary to the plurality of this Court that reached the issue in *Watson*, however, the *en banc* panel also held that:

The crucial difference between a treatment and impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer defends by explaining the reason for the disparity he must do more than articulate the reason. He must prove the job relatedness or business necessity of the practice.

*Id.* at 1485.

On remand from the Ninth Circuit *en banc*, the original panel erroneously held in *Atonio III* that the "quantity and quality of the statistical evidence which will give rise to an inference [of disparate impact] is the same as that which will give rise to an inference of discriminatory intent." 827 F.2d 439, 442 (9th Cir. 1987). The panel noted that the district court had found the plaintiffs' comparative statistics showing a concentration of minorities in unskilled cannery worker jobs to be probative of intentional discrimination. Nevertheless, it found that they had established disparate impact, even though the plaintiffs did not show that the workforce imbalance was specifically due to particular criteria, as required by *Atonio II*.

Moreover, the panel simply disregarded the defendants' statistics showing that, while external availability of non-whites for skilled jobs was 2.5 percent to 20 percent, non-whites actually were employed in about 21 percent of the non-cannery positions in the defendants' Alaska operations. In addition, even though the plaintiffs had not shown that their statistical disparities were caused by the adverse impact of the identified selection criteria and practices, as required by the *en banc* decision, the *Atonio III* panel proceeded to consider defendants' business explanations for those criteria and practices and found them insufficient to prove business necessity.



## SUMMARY OF ARGUMENT

Numerous federal appellate courts, and at least four justices of this Court, have correctly recognized that the disparate impact theory is appropriate, not for wide-ranging attacks on a company's employment practices, but only for challenges aimed at clearly delineated, facially neutral employment policies that can be shown to have significantly disparate effects on different race or sex groups. See, e.g., *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988) (plurality opinion); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), and *Maddox v. Claytor*, 764 F.2d 1539, 1548 (11th Cir. 1985). The Ninth Circuit therefore erred in requiring the trial court to evaluate the business necessity of almost all of the defendants' hiring and promotion practices and criteria, when none had been shown to cause the workforce imbalance. Unless such a causal connection is shown, it cannot be said with any degree of certainty that the statistical disparity to which the plaintiffs point was an "effect", or resulted from the "impact", of the defendant's employment practices. Hence, there is no basis under a disparate impact or "effects" test for requiring the defendants to justify those practices.

If plaintiffs can establish *prima facie* discrimination under the impact theory simply by introducing general comparative statistics showing a workforce imbalance, without having to show that the imbalance is causally linked to one or more specific practices of the employer, then employers will effectively be forced to justify their entire selection processes in virtually every Title VII lawsuit, unless they can rebut the plaintiff's statistics. And if, to meet this rebuttal burden, employers are then required to prove legitimate business reasons for their selection procedures by validation or some other strict standard, a *prima facie* case will almost inevitably lead to a finding of discrimination. As a consequence, "quotas

and preferential treatment [may] become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability" for employers. *Watson*, 108 S.Ct. at 2788 (O'Connor, J., for a plurality of the Court). That result would be directly contrary to the expressed will of the Congress that enacted Title VII. Accordingly, this Court should eschew the reasoning of the Ninth Circuit panel in *Atonio III*, and instead apply the principles articulated by the *Watson* plurality.

## ARGUMENT

### I. THE DISPARATE IMPACT THEORY OF TITLE VII MAY BE USED ONLY WHERE A SPECIFIC, FACIALLY NEUTRAL EMPLOYMENT PRACTICE OR CRITERION APPLYING TO A GROUP OF EMPLOYEES IS SHOWN TO CAUSE AN ADVERSE IMPACT ON A PROTECTED CLASS OF EMPLOYEES.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Supreme Court stated that, in appropriate circumstances, either a disparate treatment or disparate impact theory may be applied to a particular set of facts. For both theories to be applicable in a particular case, however, the plaintiff must allege facts that give rise to the application of both theories. Although the plaintiffs here have identified 16 practices or criteria that they contend resulted in adverse impact, they have failed to show a causal link between any of those criteria or practices and the statistical disparities to which they point. Proof of such a causal connection must be recognized as a *sine qua non* of the disparate impact theory. Without such a connection, there is no basis for finding that the perceived disparity was in fact an "effect," or resulted from the "impact", of the challenged criteria or practices.

If a *prima facie* case can be based on statistics like those relied on by the plaintiffs here—showing only that

a workforce imbalance exists but telling nothing whatever about its cause—then an employer charged under that theory will effectively be required to justify all of its employment practices, when in fact, none of them may have caused the imbalance. Such a result would be contrary to well established Title VII principles and precedents, as discussed below. Glaring workforce imbalances revealed by general comparative statistics may be sufficient in some cases to raise an inference of discriminatory intent, but in this case the trial court specifically found that the plaintiffs' statistics were inadequate to show disparate treatment. For the court of appeals to hold, nevertheless, that these same statistics could establish a *prima facie* case under the impact theory was, we submit, clear error.

**A. This Court has Applied the Disparate Impact Theory Only in Cases Challenging Specific, Facially Neutral Employment Practices or Criteria When the Plaintiff Has Shown a Direct Link Between Those Practices or Criteria and Adverse Impact on a Group of Employees.**

The Court has carefully guarded the distinction between the disparate impact and disparate treatment theories of Title VII. Consistently, the Court has applied disparate impact only to claims challenging specific, facially neutral employment practices or criteria that adversely affect a protected class of employees.

The Court adopted the impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424, (1971), as a judicial gloss on Section 703(a)(2) of Title VII.<sup>1</sup> *Griggs* held that "prac-

<sup>1</sup> Section 703(a)(2) provides:

It shall be an unlawful employment practice for an employer—  
\* \* \* to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (1981).

tices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430 (emphasis added). The "practices, procedures or tests" at issue in *Griggs* were requirements for a high school education and a passing score on a standardized general intelligence test. The Court found those requirements to be in violation of Title VII because they were insufficiently related to the jobs for which they were used. *Id.* at 431-34. Thus, *Griggs* interpreted Section 703(a)(2) to prohibit specific, facially neutral employment practices or criteria that operate to discriminate against protected classes of employees.<sup>2</sup>

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court expressly contrasted devices like those at issue in *Griggs* with selection procedures with multiple practices or criteria. The plaintiffs in *Furnco* challenged

<sup>2</sup> A number of other decisions of this Court applying disparate impact analysis also have been limited to the narrow context of specific, facially neutral practices or criteria. For example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) applied the impact theory to employment tests that "select[ed] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court relied on the impact theory in reviewing a rule that excluded women from a disability plan based on pregnancy. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), presented the Court with height and weight criteria that adversely affected women and could not be shown to have a "business necessity." The Court recognized that in dealing with such "facially neutral qualification standards" impact analysis should be allowed, and emphasized that a *prima facie* case is shown under the impact theory by demonstrating that the particular criteria in question actually caused the selection of applicants in a discriminatory manner. *Id.* at 328-29. See also *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (impact analysis applied to rule denying accumulated seniority to employees return to work after pregnancy); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (impact theory used to review anti-narcotics rule).



practices by which the employer hired only persons he considered to be experienced and competent or who were referred to him as similarly skilled. The Court refused to apply the impact theory, noting that the case "*did not involve* employment tests . . . or *particularized requirements* such as . . . height and weight specifications . . . ." *Id.* at 575 n. 7 (emphasis added). Moreover, this Court in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982), acknowledged that the practices in *Furnco*, like some of the selection practices identified in *Atonio I*, 768 F.2d at 1133 (quoted at p. 6, *supra*) involved facially discriminatory rather than facially neutral policies.

In *Teal*, the Court for the first time applied the disparate impact theory to a multicriteria selection process involving a test, past work performance, supervisors' recommendations and seniority. Unlike the plaintiffs herein and in *Furnco*, the plaintiffs in *Teal* were able to demonstrate that one of the criteria—the test—had an adverse impact against minorities even though the overall selection process did not have adverse impact against minorities. The Court emphasized that its decisions applying the impact theory had "consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*" and had "never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted." 457 U.S. at 450 (emphasis in original). In the context of this case, *Teal* means that, just as a racially balanced "bottom line" does not insulate an employer from liability from disparate impact under Title VII, a workforce imbalance that has not been shown to be caused by a specific, facially neutral selection criterion or practice cannot serve as the basis for establishing a *prima facie* case of disparate impact.

Finally, in *Watson*, Justice O'Connor, in an opinion joined by at least a plurality of the Court, effectively summarized the rules for establishing a *prima facie* case

of disparate impact that have been consistently applied by the Court since *Griggs*:

First, we note that the plaintiff's burden goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. *Cf. Connecticut v. Teal*, 457 U.S. 440 . . . (1982).

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations . . . have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

108 S.Ct. at 2788-2789 (O'Connor, J.); *id.* at 2792 n.2 (Blackmun, J.), *See also AFSCME v. State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process"). Amicus urges the full Court to endorse these principles here.

In this case, while the plaintiffs have identified and challenged *en masse* 16 specific employment practices and criteria, they have not isolated any particular criterion or practice nor shown it to be causally linked to the statistical disparities to which they point. Thus, they have failed to establish the *sine qua non* of disparate impact—a showing that the disparity was, in fact, the *effect* of the employer's practice.



To the extent that the court below ignored the requirement of proof of causation articulated in *Watson*, it also erred in asserting as a general proposition that "statistical evidence, which will give rise to an inference [of disparate impact] is the same as that which will give rise to an inference of discriminatory intent." 827 F.2d at 442. The proposition, as stated, is overly broad. Glaring statistical disparities standing alone may sometimes be sufficient to raise an inference of discriminatory intent, but without proof of a causal link to some specific employment criterion or practice, the same statistics will not suffice to make out a case of disparate impact.

In any event, amicus further contends that qualified applicant flow statistics showing selection rates based on specified criteria, not representation statistics, are the appropriate statistical basis for determining whether there was disparate impact in this case. In *Teamsters*, 431 U.S. at 342 n.23, and *Hazelwood School District v. United States*, 433 U.S. at 308 n.13, the Court recognized the superiority of actual applicant flow data over representation statistics for purposes of pass-fail comparisons of adverse impact. Moreover, in *Beazer*, the Court required the use of actual applicant flow data to determine adverse impact, holding that general population data "tells us nothing about the class of otherwise qualified applicants and employees" and, therefore are "virtually irrelevant." 440 U.S. at 585-86. Indeed, as the trial court found in this case, nonwhites did not apply nor were they deterred from applying to skilled jobs. The absence of interest in these positions by minorities serves as an absolute defense to allegations of job segregation.<sup>3</sup>

<sup>3</sup> See, e.g., *Ste. Marie v. Eastern Railroad Association*, 650 F.2d 395, 403 (2d Cir. 1981) (women not interested in being railroad inspectors); *Mazus v. Department of Transportation*, 629 F.2d 870 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981) (few women sought road maintenance positions); *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379 (1st Cir. 1980) (distribution of workers due to nu-

**B. Numerous Well Reasoned Decisions of Courts of Appeals Have Held That The Disparate Impact Theory Is Limited To Claims Involving The Application Of Specific, Facially Neutral Employment Practices Or Criteria, Because Only In Such Cases Is It Possible To Demonstrate A Causal Connection Between A Particular Practice Or Criterion And Adverse Impact On Protected Employees.**

Under a proper interpretation of Title VII, disparate impact analysis is not the "appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding v. University of Washington*, 740 F.2d 686, 707 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), quoting *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982). When removed from the context of challenges to "clearly delineated neutral policies of employers," the disparate impact theory becomes too vague to be applicable. *Id.* at 708 (emphasis added). Thus, because impact analysis was developed "to handle specific employ-

merous factors including employee preferences, job qualifications, and economic conditions affecting job availability); and *Lee v. Washington County Bd. of Educ.*, 625 F.2d 1235 (5th Cir. 1980) (school board rebutted prima facie case by demonstrating that lack of blacks hired for positions in question was due solely to lack of black applicants).

Even with respect to the plaintiff's disparate treatment claims, it is well settled that disparities in female and minority representation in higher level jobs compared to their representation in lower levels is not probative of discrimination absent proof that the women and minorities in lower positions were qualified for the higher level positions. See, e.g., *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 105 (4th Cir. 1979) ("The assumption that minimally qualified hourly rated employees were qualified for promotion to a salaried position is simply unfounded"), *Pack v. Energy Research and Development Administration*, 566 F.2d 1111, 1113 (9th Cir. 1977) ("No evidence whatsoever was introduced to demonstrate that the lower-grade professional women were qualified to occupy the higher positions or that there elsewhere existed a pool of qualified women applicants").

ment practices not obviously job-related," *id.* at 707, it clearly should not be applied to attacks on employment practices or criteria without establishing a clear link to the practices causing the adverse impact.

The First Circuit in *Latinos Unidos de Chelsea En Accion v. Secretary of Housing and Urban Development*, 799 F.2d 774, 786-87 (1st Cir. 1986), has pointed out that:

Without the threshold of a specific, facially-neutral procedure (or possibly, a combination of procedures, see *Griffin v. Carlin*, 755 F.2d at 1525), the disparate impact test is simply a stripped-down version of the discriminatory treatment test. We do not believe the Supreme Court in *Griggs* intended to set up an alternative test for finding discrimination that simply dropped the requirement of intent. Rather, the disparate impact model was created "to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove". If plaintiffs' claims do not focus on a specific practice, it is impossible to apply the *Griggs* analysis, which envisions the employer rebutting a prima facie case of discrimination by showing that the practice leading to a disparate impact was justified as necessary to the employer's business, *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854. (Footnote omitted.)

Numerous other federal appellate courts have adopted this interpretation of the appropriate context for applying the disparate impact theory. See *Maddox v. Claytor*, 764 F.2d 1539, 1548 (11th Cir. 1985) (even where impact analysis is applied to subjective practices, plaintiffs must identify particular steps in the selection process). See also *Atonio II*, 810 F.2d at 1485; *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014 (1st Cir. 1984); *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984); *Carroll*

*v. Sears, Roebuck & Co.*, 708 F.2d 183, 189-90 (5th Cir. 1983); *Pope v. City of Hickory, North Carolina*, 679 F.2d 20, 22 (4th Cir. 1982).

The Fifth Circuit's decision in *Pouney*, the first case to address whether impact analysis should be applied to a wide-ranging attack on multiple employment practices or criteria, explains why the disparate impact theory is inappropriate for such an attack. After holding that the theory "applies only when an employer has instituted a specific procedure . . . that can be shown to have a causal connection to a class-based imbalance in the work force," *Pouney*, 668 F.2d at 800 (emphasis added), the appellate court explained:

Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy . . . . We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices. . . .

*Id.* at 801.

Only specific, facially neutral practices or criteria are amenable to the required showing of a causal connection. As recognized by *Atonio I*:

Were the facial neutrality threshold to disappear or be ignored, the distinction between disparate impact and disparate treatment would diminish and intent would become a largely discarded element. Rather than being an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such



a result has been mandated by Congress or through Supreme Court interpretation of Title VII. Therefore, *practices and policies such as a lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.*

768 F.2d at 1133. See also *Griffin v. Bd. of Regents of Regency Universities*, 795 F.2d 1281, 1288 n.14 (7th Cir. 1986) endorsing this view. As the Fifth Circuit explained further in *Pouncy*:

The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force. *Aptitude tests, height and weight requirements, and similar selection criteria* all may be shown to affect one class of employees more harshly than another *by controlling for the impact of the employment practice on one class in the employer's work force so that it can be measured.*

668 F.2d at 801 (emphasis added).

Other federal circuit courts also have recognized that proof of a causal connection between adverse impact and a particular practice or criterion is central to the disparate impact theory. The First Circuit has ruled that "plaintiffs must show a causal connection between the application of the criterion in question and an alleged discriminatory impact on the protected class," and that the causal link must be shown "*independent of other factors.*" *Robinson*, 732 F.2d at 1016 (emphasis added). In *Carroll*, 708 F.2d at 189, the Fifth Circuit held that the plaintiffs had not made a *prima facie* showing of disparate impact because they had failed "to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force." The court further observed:

The causal requirement recognizes that underrepresentation of blacks might result from any number of factors, and it places an initial burden on the plaintiff to show that the *specific factor* challenged under the disparate impact model results in the discriminatory impact.

708 F.2d at 189-90 (emphasis added). As the plurality opinion in *Watson* stated:

It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance . . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such . . . .

108 S.Ct. at 2787.

Consistent with the decisions of other appellate courts, the Ninth Circuit in *Atonio II* held that one of the three elements of a *prima facie* showing of disparate impact is to "show the causal relationship between the identified practices and the impact." 810 F.2d at 1482. That is, the "disparate impact analysis may be applied to challenge [both objective and] subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class." *Id.* Absent such proof, plaintiffs have not shown that the impact was "because of race, color, religion, sex, or national origin" within the meaning of Title VII. *Cf. New York City Transit Authority v. Beazer*, 440 U.S. 568, 598 n.3 (1978) ("The failure to hire is not 'because of' race, color, religion, sex, or national origin if the adverse relationship of the challenged practice to one of those factors is purely a matter of chance—a statistical coincidence.") (White, J., joined by Marshall, J., dissenting).



If the Ninth Circuit panel decision in *Atonio III* is allowed to stand, general unrefined statistics showing disparities in the representation of a protected class would be permitted to assume unwarranted importance in the determination of discrimination based on adverse impact, even if the general evidence is not linked to the selection practices at issue. EEAC urges this Court to prevent such a misapplication of Title VII, and to hold that statistics can be used to establish disparate impact only if they reflect the results of specific, facially neutral employment practices or criteria that have been identified as the cause of the statistically significant disparity.

**II. REQUIRING A DEFENDANT TO PROVE THE BUSINESS NECESSITY OF ITS PRACTICES AFTER A *PRIMA FACIE* CASE HAS BEEN ESTABLISHED—THAT IS, SHIFTING THE BURDEN OF PERSUASION TO THE EMPLOYER—INTERFERES WITH TRADITIONAL MANAGEMENT PREROGATIVES AND, IN EFFECT, MEANS THAT EMPLOYERS MUST ADOPT EITHER “BEST” HIRING PRACTICES OR QUOTAS, CONTRARY TO THIS COURT’S HOLDINGS IN *WATSON*, *FURNCO* AND *BURDINE*.**

As discussed below, as applied by the lower courts prior to *Watson*, the employer’s rebuttal burden under the disparate impact theory is extremely difficult to meet. It requires the employer to prove by a preponderance of the evidence that particular selection procedures, whether objective or subjective, have “a manifest relationship to the employment in question” or to the safe and efficient operation of its business. *Griggs*, 401 U.S. at 432. The burden is especially difficult to the extent that employers are required to validate their employment practices in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.*

The *Watson* plurality opinion, however, sets forth a realistic apportionment of the burdens of proof under the adverse impact theory—one which is consistent with this

Court’s prior decisions applying the theory and with Congressional intent. This case affords the full Court an opportunity to endorse the *Watson* plurality’s approach, and thus add both clarity and reason to an area of Title VII law that has too long lacked both.

To rule otherwise—that is, to adopt an evidentiary rule that requires an employer to prove by a preponderance of the evidence the business necessity of both its objective and subjective business practices and criteria that have been shown to cause adverse impact—would mean that virtually no selection practices, except those which are recognized by a consensus as “best” practices, will survive under such a burden. As a result, even employers with the best of will and intention will be forced to hire by the numbers in order to avoid litigation; that is, establish quotas based on workforce and population statistics.

Like the defendants in this case, the vast majority of large and small employers rely on selection procedures involving a mix of objective and subjective criteria and practices. Relatively few employers rely exclusively on validated tests to screen candidates for hire or promotion. See Bureau of National Affairs, *Recruiting and Selection Procedures*, PF Survey No. 146 (May 1988) at 17-25. Ninety (90) percent of all employers use interviews to screen applicants for employment, relying on a wide variety of objective and subjective criteria related to job performance. *Id.* at 20-21.

The reason why employers do not currently rely extensively on objective, validated selection practices is because of the complexity and cost of validation<sup>4</sup> and the

<sup>4</sup> The expenditure to employers to validate selection criteria is substantial. For example, the measurement of one simple characteristic reportedly costs up to \$100,000, according to a 1979 study. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist’s View*, 54 Notre Dame L. Rev. 633,

difficulty of compliance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.*, which vary from generally accepted professional practices in test development. *See generally*, Potter, *Employee Selection: Legal and Practical Alternatives to Compliance and Litigation* (1986).<sup>5</sup> This is true even though competitive pressures to select the most productive employees available dictate that companies should use validated, objective procedures. In 1982, after a 3-year study, the National Research Council found that "most [court] decisions have ruled against the challenged tests; no selection program seems to have survived when the Guidelines were applied in any detail." National Research Council, *Ability Tests: Uses, Consequences and Controversies* (1982) at 105. Moreover, a plurality of the Court in *Watson*, stated that: "It is self-evident that many jobs . . . require personal qualities that have never been considered amenable to standardized testing." 108 S.Ct. at 2791. Moreover, Justice Blackman in *Watson* recognized that the formal validation techniques of the Uniform

643 (1979). Moreover, in 1978, the then EEOC Vice Chairman Daniel E. Leach stated that the cost of a criterion related validity study ranged from \$100,000 to \$400,000. Daily Lab. Rep. at D-14 (Dec. 5, 1978).

<sup>5</sup> In April 1976, David L. Rose, Chief of the Employment Section, Civil Rights Division, Department of Justice, stated in a memorandum to the Deputy Attorney General, that the thrust of the Guidelines was to: "place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who would be prosecuted; and to set aside objective selection procedures in favor of numerical hiring." 122 Cong. Rec. 22950 (daily ed. July, 1976) (emphasis supplied). *See also* Ballew, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203, 212-217 (1987), which documents the declining deference that this and other courts give to the technical validation requirements of the Uniform Guidelines and the differences between accepted professional practices and the Guidelines' requirements.

Guidelines "may sometimes not be effective in measuring the job-relatedness of subjective-selection processes." 108 S.Ct. at 2795.

In *Watson*, a plurality of the Court stated that the "business necessity" or "job relatedness" defense under *Griggs* did not shift the burden of persuasion to the defendant. 108 S.Ct. at 2790. It said that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. *Id.* Even with respect to defending standardized or objective tests, the plurality held that employers are not required to introduce formal validation studies showing that particular criteria predict actual on-the-job performance. *Id.* Once "the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undesirable facial effect, would also serve the employer's interest in efficient and trustworthy workmanship.'" *Id.* (citation omitted).<sup>6</sup> This burden of proof scheme is consistent with the principles articulated by this Court in *Furnco* and *Burdine* and the legislative history of Title VII.

Most if not all employment-related decisions are based on the employer's desire to choose the best person for the job. *See Furnco*, 438 U.S. at 577 ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying

<sup>6</sup> In meeting the pretext burden, the plurality pointed out that:

Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals. The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment.

108 S.Ct. at 2690 (citation omitted).



ing reasons, especially in a business setting.") The purpose of Title VII is to ensure that those decisions are made without consideration of illegal and inappropriate factors such as race, sex, and national origin. *Griggs*, 401 U.S. at 431. However, as the Court in *United Steelworkers v. Weber* 443 U.S. 193, 206 (1979) recognized, the legislative history to Title VII shows that the statute would not have been enacted without recognition of and preservation of, managerial discretion in employment decisions:

Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives . . . be left undisturbed to the greatest extent possible. H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

In *Furnco*, the Court held that Title VII does not require businesses to adopt "best" hiring procedures or require an employer to "pursue [] the course which would both enable [it] to achieve [its] own business goal and allow [it] to consider the *most* employment applications." 438 U.S. at 577 (emphasis in original). Importantly, with respect to the lower court's conclusion in *Furnco* that "different practices would have enabled the employer at least consider, and perhaps hire, more minority employees," this Court concluded that "courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved." *Id.* at 578. It also emphasized that: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.*

In sum, under *Furnco*, an employer is not required to adopt "best" hiring procedures that would permit it "to

at least consider . . . the most minority employees." *Id.* Indeed, a unanimous Court expressly held in *Burdine* that Title VII "was not intended to 'diminish traditional management prerogatives'" and that an "employer has discretion to choose among equally qualified candidates." 450 U.S. at 259 (citation omitted).

However, a disparate impact burden of proof scheme that imposes on employers a burden of persuasion to prove the business necessity of its practices in effect compels employers to use "best" hiring practices or, alternatively to establish quotas. As recognized by the Court's plurality decision in *Watson*:

If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' expressed intent, and it should not be the effect of our decision today.

108 S.Ct. at 2788.<sup>7</sup>

As discussed above, even validated objective selection procedures have been difficult to justify under Title VII

<sup>7</sup> One commentator has stated that the purpose of the disparate impact theory "is better served by placing a moderate burden upon defendants rather than a heavy burden that would in effect, prevent hidden discrimination only by requiring reverse discrimination". Rutherglen, "Disparate Impact Under Title VII: An Objective Theory of Discrimination," 73 Va. L. Rev. 1297, 1315 (1987). In addition, the commentator points out that:

A heavy burden serves the more controversial purpose of promoting equal opportunity directly by discouraging employment practices with adverse impact but only at the risk of contradicting the prohibition against required preferences in section 703(j).

*Id.* at 1315-16.



because lower courts for the most part have required employers to show that the practice is absolutely essential or necessary to the operation of the business.<sup>8</sup> This has occurred even though no alternative to tests is currently available that is equally informative, and as technically and economically viable, with respect to assessing the capabilities of individuals. *Ability Tests* at 143-44. To impose a burden of persuasion on employers to justify validated as well as less precise measures literally condemns all employment selection practices and criteria when a company has an internal workforce imbalance or a workforce that is different from the general population. Indeed, three Justices of this Court in *Teal* recognized that "there are few if any tests . . . that accurately reflect the skills of every individual candidate. *Teal*, 457 U.S. at 463. (Powell, J., dissenting).

A requirement that the employer prove the business necessity of its practices also misapprehends the orderly burden of proof scheme established in *Griggs* and *Albemarle*. It merges the rebuttal and pretext stages, because the employer in proving that its job related criteria are essential to its business must also explain why it did not rely on other criteria and practices as well. For example, Section 3B of the Uniform Guidelines provides that:

[W]henever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alterna-

<sup>8</sup> See, e.g., *Kirby v. Colony Furniture Co., Inc.*, 613 F.2d 696 (8th Cir. 1980); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971). Compare *EEOC v. Kimbrough Investment Co.*, 703 F.2d 98, 100 (5th Cir. 1983) ("If the plaintiff succeeds in this showing [of a prima facie case of discrimination], the focus of attention shifts to the employer to persuade the court of the existence of a 'legitimate business reason' by a preponderance of the evidence."); and *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981) (The practice must substantially promote the proficient operation of the business). See also Schlei and Grossman, *Employment Discrimination Law* at 1329-1330 n.148 (1988).

tive selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.

An employer may conduct this search voluntarily, but it is inconsistent under *Albemarle* to require the employer prove this as part of its rebuttal burden.<sup>9</sup> Indeed, the Court in *Albemarle* clearly stated that once the defendant meets its burden of proof, the complaining party can show the discriminatory pretext of the criteria or practices used by the employer by demonstrating "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" 422 U.S. at 425.

In sum, shifting the burden of proof to the defendant to prove the job relatedness of its selection procedures unnecessarily interferes with the rights of employers to determine its selection practices. Alternatively, permitting the defendant to state or produce its legitimate business reasons for relying on particular criteria or practices will not force employers to abandon nondiscriminatory employment practices or to engage in illegal quotas, but instead allows plaintiffs to show that the criteria or practice is a pretext for discrimination in accordance with *Albemarle*.

<sup>9</sup> In addition, several lower courts have required the defendant to assume this burden as a part of showing the necessity of its selection criteria. See, e.g., *Kirby*, 613 F.2d at 703-04, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979) cert. denied, 446 U.S. 928 (1980); and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 244 n.87 (5th Cir. 1974), cert. denied, 467 U.S. 1243 (1984).

**CONCLUSION**

For the reasons stated herein, EEAC respectfully submits that the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS

DOUGLAS S. McDOWELL

EDWARD E. POTTER, P.C.\*

McGUINNESS & WILLIAMS

1015 Fifteenth Street, N.W.

Suite 1200

Washington, D.C. 20005

(202) 789-8600

*Attorneys for the Amicus Curiae  
Equal Employment Advisory  
Council*

\* Counsel of Record

September 10, 1988

SEP 9 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

No. 87-1387

---

---

In The  
**Supreme Court of the United States**  
October Term, 1987

---

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

---

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

---

**BRIEF FOR THE CENTER FOR CIVIL RIGHTS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

---

---

ARTHUR H. ABEL  
FAEGRE & BENSON  
2200 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 336-3000

CLINT BOLICK\*  
JERALD L. HILL  
MARK J. BREDEMEIER  
LANDMARK LEGAL FOUNDATION  
CENTER FOR CIVIL RIGHTS  
107 Second Street, N.E.  
Washington, D.C. 20002  
(202) 546-6045

\* Counsel of Record



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
THE ANALYTICAL FRAMEWORK FOR AD- VERSE IMPACT THAT THE PLURALITY AR- TICULATED IN <i>WATSON v. FORT WORTH</i> <i>BANK AND TRUST</i> SHOULD BE APPLIED TO BAR RESPONDENTS' BROAD, ILL-DEFINED CHALLENGES TO PETITIONERS' BUSINESS DECISIONS .....	3
A. The Plurality's Opinion in <i>Watson</i> Properly Recognized that the Rationale Underlying Title VII's Evidentiary Burden is the Same for All Cases .....	5
B. The Plurality's Opinion in <i>Watson</i> Properly Adapted the Traditional Adverse Impact Theory to the Circumstances of Subjective Decisionmaking .....	12
C. The Ninth Circuit's Decision Reversing the Trial Court's Judgment for Petitioner's Con- flicts with the Plurality's Opinion in <i>Watson</i> .....	16
CONCLUSION .....	20

## TABLE OF AUTHORITIES

CASES	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	4, 10, 11, 15
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	8
<i>Atonio v. Wards Cove Packing Co.</i> , 827 F.2d 439 (9th Cir. 1987) .....	16, 17, 18
<i>Atonio v. Wards Cove Packing Co.</i> , 810 F.2d 1477 (9th Cir. 1987) (en banc) .....	6
<i>Atonio v. Wards Cove Packing Co.</i> , 34 Empl. Prac. Dec. (CCH) 33,821 (W.D. Wash. 1983) .....	19
<i>Board of Trustees of Keene State College v. Sweeney</i> , 439 U.S. 24 (1978) .....	7
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	4, 15
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	4, 15
<i>Furnco Construction Co. v. Waters</i> , 438 U.S. 567 (1978) .....	5, 8, 10, 14
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	Passim
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977) .....	9, 15
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	5, 7, 8
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	4, 7, 11
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	7, 9
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	7, 8, 9, 10
<i>United States Postal Service v. Aikens</i> , 460 U.S. 711 (1983) .....	6

## TABLE OF AUTHORITIES—Continued

	Page
<i>United Steelworkers of America v. Weber</i> , 443 U.S. 193 (1979) .....	13
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	4, 11
<i>Watson v. Fort Worth Bank and Trust</i> , — U.S. —, 108 S.Ct. 2777 (1988) .....	Passim
OTHER AUTHORITIES	
RULES OF EVIDENCE	
Fed. R. Evid. 301 .....	10
LEGISLATIVE MATERIALS	
110 Cong. Rec. 13,076-79 (1964) (discussion between Sen. Ervin and Sen. Cooper) .....	13
110 Cong. Rec. 13,080 (1964) (remarks of Sen. Humphrey) .....	5, 13
TREATISES AND ARTICLES	
F. James & G. Hazard, <i>Civil Procedure</i> (2d ed. 1977) .....	7
Lerner, <i>Employment Discrimination: Adverse Impact, Validity, and Equality</i> 1979 Sup. Ct. Rev. 17 .....	12
Lerner, <i>Washington v. Davis: Quantity, Quality and Equality in Employment Testing</i> , 1976 Sup. Ct. Rev. 263 .....	6
B. Schlei & P. Grossman, <i>Employment Discrimination Law</i> (2d ed. 1983) .....	11
9 J. Wigmore, <i>Evidence</i> (3d ed. 1940) .....	10

No. 87-1387

---

In The  
**Supreme Court of the United States**  
October Term, 1987

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,  
*Petitioners,*

v.

FRANK ATONIO, *et al.*,  
*Respondents.*

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**BRIEF FOR THE CENTER FOR CIVIL RIGHTS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

---

**INTEREST OF AMICUS CURIAE**

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and fundamental individual liberties. A vital aspect



of this mission is defending the integrity of civil rights laws in order to give meaning to the precious popular consensus expressed in those laws.

---

 o
 

---

### SUMMARY OF ARGUMENT

In *Watson v. Fort Worth Bank and Trust*, — U.S. —, 108 S.Ct. 2777 (1988), this Court extended the statistical principles behind the adverse impact theory to reach subjective employment practices under Title VII. That extension, as carefully delineated in Justice O'Connor's plurality opinion, was entirely consistent with the basic principles established in prior Title VII cases, which historically defined just two types of analysis: the adverse impact and disparate treatment tests.

The vital contribution of the *Watson* plurality was to harmonize these two theories of proof, which previously were evolving in the lower courts in analytically inconsistent and sometimes contradictory ways. The *Watson* plurality demonstrates that just as there is but one objective in Title VII cases—to identify discriminatory employment practices—so is there a single coherent method of analysis, of which adverse impact and disparate treatment are distinct but overlapping variants.

The adverse impact theory merely describes a method of *prima facie* analysis based on the use of statistics. Although much of the dictum in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is limited to the unique context of that case, its *prima facie* standards are transferable to

any case susceptible of proof by statistical inference. But because vague statistical challenges based on subjective decisionmaking have the capacity to “chill” an employer's nondiscriminatory personnel judgments, this Court should adopt the plurality's standards in *Watson* and apply them to this and other such cases.

---

 o
 

---

### ARGUMENT

#### **THE ANALYTICAL FRAMEWORK FOR ADVERSE IMPACT THAT THE PLURALITY ARTICULATED IN *WATSON v. FORT WORTH BANK AND TRUST* SHOULD BE APPLIED TO BAR RESPONDENTS' BROAD, ILL-DEFINED CHALLENGES TO PETITIONERS' BUSINESS DECISIONS**

In *Watson v. Fort Worth Bank and Trust*, — U.S. —, 108 S.Ct. 2777 (1988), this Court held for the first time that the adverse impact theory for proving Title VII discrimination theoretically reached employment decisions based on subjective criteria. However, cognizant of the potential “chilling effect” that such an extension might have on legitimate business practices, the plurality carefully circumscribed that theory in order to keep it “within its proper bounds.” *Id.* at 2788. The plurality's close examination of the theoretical foundations of Title VII's evidentiary burdens was rationally conceived and should be applied here—for the respondents advance sweeping, ill-defined claims of subjective discrimination, and take precisely the shotgun approach to litigation that *Watson's* careful analysis was intended to proscribe.

Indeed, it was this spectre of freewheeling litigation practice that the Bank in *Watson* raised, warning that a wholesale extension of the traditional adverse impact theory (outlined in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)) would engender an onslaught of nebuously framed civil rights claims, against which employers would find it impossible to defend without surreptitiously adopting schemes for "preferential treatment." See *Watson*, 108 S.Ct. at 2786.<sup>1</sup>

This litigation problem was slight when the adverse impact theory was confined to the traditional *Griggs*-type scenario, where seemingly arbitrary (but facially neutral) objective "measuring devices" were involved.<sup>2</sup> But mind-

<sup>1</sup> Indeed, one commentator complains that adverse impact has been applied indiscriminately "to cases arising out of vastly different factual contexts, making the burden of proving discriminatory effects weightless, and the [employer's] burden . . . onerous, at times impossible." Lerner, *Washington v. Davis: Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 267.

<sup>2</sup> *Griggs* involved the seemingly arbitrary use of standardized employment tests that were administered to all employees equally but which had a substantially adverse impact on the passage rate of blacks. In Chief Justice Burger's oft-quoted phrase, the facially neutral and otherwise objective tests were illegal under Title VII because they acted like "built-in headwinds" against minority groups and were "unrelated to measuring job capability." 401 U.S. at 432. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (written aptitude tests and diploma requirements); *Washington v. Davis*, 426 U.S. 229 (1976) (written test of verbal skills); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (rule against employing drug addicts); *Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination).

During the period that these decisions were written, it is clear that the Court did not intend the *Griggs* analysis to apply

(Continued on following page)

ful that a mechanical extension of *Griggs* into the sphere of subjective decisionmaking would "lead in practice to perverse results" that were antithetical to Title VII's goal of employment opportunities based on qualifications,<sup>3</sup> the plurality in *Watson* carefully harmonized the traditional Title VII analyses of adverse impact and disparate treatment (outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

**A. The Plurality's Opinion in *Watson* Properly Recognized that the Rationale Underlying Title VII's Evidentiary Burden is the Same for All Cases.**

1. One of the breakthrough of the plurality's opinion in *Watson* was a more careful explication of the evidentiary considerations appropriate to proving discrimination through adverse impact. The prior absence of a unified adverse impact framework was particularly vexing in the area of subjective decisionmaking. Although the Court had gone far toward analyzing such cases in the past, see, e.g., *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), it never previously considered how in this context the use of statistical data from the adverse impact theory should fit into the evidentiary scheme.

(Continued from previous page)

fully outside of the narrow context of cases where employers allowed test results, or other "fixed measures," to control their personnel decisions. See, e.g., *Griggs*, 401 U.S. at 433, 436; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.14 (1973); *Dothard*, 433 U.S. at 340 (Rehnquist, J., concurring).

<sup>3</sup> To quote Senator Humphrey, "what [Title VII] does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications . . ." 110 Cong. Rec. 13,088 (1964).



This problem has been a subject of enormous controversy through the years, and one that constantly has plagued both courts and commentators.<sup>4</sup> But we believe that the analysis of *Watson's* plurality does much to eliminate that confusion and to stake out the neutral principles on which future litigants may rely.

2. It now seems clear that, whatever the chosen method of proof, the Court views the "ultimate determination of factual liability" as truly the same for all civil rights cases. *United States Postal Service v. Aikens*, 460 U.S. 711, 718 (1983) (Blackmun, J., concurring). At bottom, the plaintiff must adduce sufficient evidence to imply and ultimately prove that a particular employment practice discriminates on the basis of race, color, gender, national origin, or religious preference. *See Aikens*, 460 U.S. at 715; *Watson*, 108 S.Ct. at 2790.

<sup>4</sup> See, e.g., *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480-81 & n.1 (9th Cir. 1987) (en banc) (discussing the differing views throughout the Circuits); *id.* at 1491-92 & n.4 (five judges concurring) (similar discussion). One commentator, particularly frustrated with this state of affairs, has written:

The trouble with [the "traditional"] categories of [Title VII's analysis] is that few cases with multiple plaintiffs fit neatly or exclusively into one category or the other. Most cases can be placed in either, and cases are now won or lost, depending upon the pigeonhole in which they are placed. The whole process begins to bear a disquieting resemblance to the bad old writ-of-action days when cleverness in juggling legal forms counted more heavily than the substance of the cases. This unfortunate impression is reinforced by the fact that the Court itself has begun to juggle the categories in arbitrary ways in order to get results it wants in particular cases.

Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 29-30 (footnote omitted).

Thus, in the first stage of all Title VII cases, a plaintiff who seeks to prove discrimination through an indirect showing must tender enough evidence to create a legal inference of discrimination. *See Teamsters v. United States*, 431 U.S. 324, 358 (1977). Although the precise formula often will vary according to the facts of each case,<sup>5</sup> the plaintiff must come forth with sufficient proof from which a reasonable fact-finder can infer causation. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 (1979).

If properly supported, this inference will attain the status of a legal presumption and will shift to the defendant the common law burden of rebuttal. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 & n.7 (1981). *See also* F. James & G. Hazard, *Civil Procedure* § 7.9, p. 225 (2d ed. 1977). At this "second stage," the employer must produce just enough admissible evidence to meet the presumption and create a "genuine issue of fact" as to whether an employment practice is based on legitimate factors, *Burdine*, 450 U.S. at 254; is "reasonably related to the achievement of some legitimate goal," *Furnco*, 438 U.S. at 578; or otherwise has "a manifest relationship to the employment in question," *Griggs*, 401 U.S. at 432.<sup>6</sup>

<sup>5</sup> Compare *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03 with *Teamsters v. United States*, 431 U.S. 324, 340 (1977) (both cases stating that the nature of the evidentiary burdens, including the use of statistics, will depend on the particular facts involved).

<sup>6</sup> Of course, the employer need not actually convince the court that it acted for these reasons. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). The evidentiary burden merely is designed to rebut the presumption of unlawful conduct and, thereby, "focus the issues" for the plaintiff's ultimate burden of proof. *See, e.g., Burdine*, 450 U.S. at 253.



3. The coherence and appeal of this neutral approach is obvious. But only recently has its efficacy become apparent. For a long time both courts and commentators were constrained by the outlines of *Griggs* and *McDonnell Douglas*, whose specific analytical guidance would not easily accommodate the potentially vast scope of subjective discrimination. As discussed below, these cases present variations within what should be one analytical continuum. However, because they were treated separately instead of together, Title VII's modes of analysis wrongly came to be viewed through a bipolar lens. This problem was exacerbated by the fact that the nature of the employer's evidence is controlled almost entirely by the evidence it seeks to rebut.

For example, in the traditional disparate treatment case, this Court has characterized the plaintiff's initial burden as simply to show that he was qualified, but rejected, for a job that someone similarly situated but outside of the protected Title VII class later received. This circumstantial showing raises an inference of unlawful discrimination. And, "if the employer remains silent in the face of the presumption, the court must enter judgment for the plaintiff because no issues of fact remain in the case." *Burdine*, 450 U.S. at 254 (footnote omitted).<sup>7</sup> The employer's burden on rebuttal, then, is to "raise[] a genuine issue of fact," *id.* at 254, by "articulat[ing] some legitimate, non-discriminatory reason" on which its subjective personnel decision was based. *Furnco*, 438 U.S. at 578.

<sup>7</sup> The evidentiary test for creating a genuine issue of disputed fact is discussed generally in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986).

Turning to the traditional adverse impact case, one view is that the plaintiff must meet a higher initial burden than in the disparate treatment case, which the defendant then must "disprove." See *Watson*, 108 S.Ct. at 2792 (Blackmun, J., concurring). But there is no apparent reason for such a rule, except that it is an outgrowth of the unique facts in *Griggs*. The better view, analytically, and one suggested by *Watson's* plurality is that a plaintiff must make the *same* initial showing in both cases: to tender enough evidence from which a court reasonably may infer illegal discrimination "under [the] circumstances." *Burdine*, 450 U.S. at 253; *cf. id.* at 254 n.7. If this seems more difficult in the impact case, it merely is because statistical proof is so open to misuse that the law will not permit its admission unless (1) the proper foundation is made and (2) the impact is sufficiently "significant" that an inference of causation is reasonable. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299, 310-13 (1977); *Teamsters v. United States*, 431 U.S. at 339-40.

Once this showing has been made and a presumption raised, the employer's evidentiary burden on rebuttal is identical to that required in a traditional disparate treatment case.<sup>8</sup> In short, the employer must justify its conduct by showing that its business practice "is reasonably related to the achievement of some legitimate goal," *Furn-*

<sup>8</sup> See *Burdine*, 450 U.S. at 254 n.7 ("[I]n the Title VII context we use 'prima facie case' . . . to denote . . . only the establishment of a legally mandatory, rebuttable presumption . . .") (emphasis added).

co, 438 U.S. at 578,<sup>9</sup> or otherwise is the product of some "business necessity," *Griggs*, 401 U.S. at 431. See *Watson*, 108 S.Ct. at 2790; cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (a traditional impact case relying on *McDonnell Douglas*, 411 U.S. at 802, to describe this "burden").<sup>10</sup>

In the usual case, meeting this obligation is fairly simple, because the targeted decisionmaking practice often will have a facially reasonable relationship to the job in question. See *Watson*, 108 S.Ct. at 2791. However, in cases like *Griggs*, where employers substitute arbitrary

<sup>9</sup> The employer need not assume a burden of proof or a duty to persuade; rather, it merely must carry a burden of production—i.e., "of going forward with evidence . . . to meet the presumption." See Fed. R. Evid. 301. See generally 9 J. Wigmore, *Evidence* § 2491 (3d ed. 1940).

<sup>10</sup> Three Justices in *Watson* would cast the burdens somewhat differently. They would hold that in the traditional disparate treatment case the employer merely must "produce" rebuttal evidence, but that in a traditional adverse impact case it must "prove" a business justification. *Watson*, 108 S.Ct. at 2792. The problem with this analysis is that it is based on loose language, not cogent logic. In cases that pre-date *Watson*, this Court regrettably has used words like "proof" and "prove" to define the second stage of a Title VII inquiry, when the context of those cases reveals that the Court did not intend to give those terms their full technical sway. See *Burdine*, 450 U.S. at 254 n.7 (suggesting precisely this point "in the Title VII context") (emphasis added).

For example, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court said that the employer's burden "is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Id.* at 577 (emphasis added). But three sentences later, the Court explained that this so-called "proof" only needed to "dispel the adverse inference." Therefore, "the employer need only articulate some legitimate, nondiscriminatory reason" for the decision. *Id.* at 578 (emphasis added) (citation omitted).

and seemingly unnecessary "employment tests" for their business judgment, it may in fact be more difficult for the employer to defend itself. This difficulty is *not* because the employer must "disprove" discrimination or otherwise meet a higher evidentiary standard. Rather, it is the natural consequence of justifying the rigid use of an employment test that appears unrelated to the job in question. Cf. *Griggs*, 401 U.S. at 431 (employer must show that its employment practice is "manifestly related to job performance").<sup>11</sup>

<sup>11</sup> Much literature exists describing the notion of test "validation," to which the Court in dictum gave a passing nod in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426-29 & n.23 (1975). See generally B. Schlei & P. Grossman, *Employment Discrimination Law* ch. 4 (2d ed. 1983). However, the *Watson* plurality specifically observed that, under this Court's prior holdings, "employers are not required . . . to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson*, 108 S.Ct. at 2790 (citing *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) (flat rule against employing drug addicts upheld because the Court considered it obvious that "legitimate employment goals of safety and efficiency" were served), and *Washington v. Davis*, 426 U.S. 229, 250 (1976) (written test upheld because it was related to success at the police academy, "wholly aside from [the test's] possible relationship to actual performance as a police officer").

This interpretation has been hailed as a rational legal approach by one lawyer-psychologist, who observes that:

All recognized scientific validation methods require the use of elaborate, formal procedures which are difficult, time-consuming, and costly. . . . [In making their employment decisions, what most employers] have relied upon instead is what psychometricians call "face validity."

Face validity is . . . a modern name for the basic, centuries-old standard of Anglo-American law—reasonableness—and business and factory managers are hardly the only

(Continued on following page)



**B. The Plurality's Opinion in *Watson* Properly Adapted the Traditional Adverse Impact Theory to the Circumstances of Subjective Decisionmaking.**

1. The traditional adverse impact test, as articulated in *Griggs*, was designed to discourage the use of "artificial, arbitrary, and unnecessary barriers to employment" that had an illegally discriminatory impact under Title VII. *Griggs*, 401 U.S. at 431. Moreover, *Griggs* was concerned mostly with curbing the use of "testing or measuring procedures," where employers gave such devices "controlling force" in the workplace. *Id.* at 436. In such cases, where employers abdicate their judgment to seemingly arbitrary measuring devices, ordinary deference to employer judgments does not necessarily attach. *See id.*

However, *Griggs* does not supplant an employer's right to make qualitative business judgments in the workplace. To the contrary, this Court recognized in *Griggs* that Title VII "expressly protects the employer's right to insist that any prospective applicant . . . must meet the

---

(Continued from previous page)

ones who rely upon it in selecting people for jobs. Face validity or reasonableness is what courts, legislatures, and the professions also rely upon when they insist that a law degree is required for the practice of law, a psychology degree for the practice of psychology, or training in education for the practice of teaching. These requirements have never been validated. They probably could not be validated. Face validity has simply been accepted and enforced on the basis of its *inherent plausibility* for jobs enumerated and for a myriad of other jobs for skilled workers, professional or nonprofessional, white collar or blue.

Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18-19 (footnotes omitted) (emphasis added).

applicable job qualifications" that the employer selects. 401 U.S. at 434 (quoting 110 Cong. Rec. 7247 (1964) (memorandum of Sen. Case and Sen. Clark)). Moreover, this Court subsequently stated that:

Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives . . . be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963).

*United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979).

Thus, while Title VII was intended "to make it an illegal practice to use race as a factor in denying employment," it was not intended to encroach on the employer's right to manage its work force. *See* 110 Cong. Rec. 13,076-79 (1964) (discussion between Sen. Ervin and Sen. Cooper); 110 Cong. Rec. 13,080 (1964) (remarks of Sen. Humphrey).

2. The traditional adverse impact test outlined in *Griggs* simply does *not* reach purely subjective business judgments. However, there is no analytical proscription against using *Griggs*' statistical proof methods to challenge such judgments as discriminatory. After all, the neutral principles that drive Title VII's factual inquiry permit the use of any evidence from which a court reasonably may infer illegal discrimination "under the circumstances" of the case.

In the usual instance, subjective personnel judgments are particularly amenable to a disparate treatment analy-



sis. See, e.g., *Furnco Construction Corp. v. Waters*, *supra*. In some cases, however, it may be possible to make out an adverse impact claim, particularly where multiple plaintiffs challenge a specific subjective decisionmaking practice. In such cases, it is natural to seek initial guidance from *Griggs* and adopt its *prima facie* standard as a model for evaluating the plaintiffs' statistical evidence.

3. This is precisely what this Court did in *Watson*, when seven Justices agreed that a plaintiff who seeks to challenge an employer's subjective business judgment in making personnel decisions must do more than merely show that there are "statistical disparities in the employer's work force." 108 S.Ct. at 2788 (plurality opinion); *id.* at 2792 & n.2 (Blackmun, J., concurring). Instead, the plaintiff must:

"isolat[e] and identify[ ]" each "specific employment practice" that allegedly is "responsible for any observed statistical disparities" in work force composition; and "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused" the alleged harm "because of [the plaintiff's] membership in a protected group."

*Id.* at 2788-89 (plurality opinion).

Of course, the quantum of proof at this stage is not absolute. But as with all circumstantial evidence based on statistics, the "statistical disparities must be sufficiently substantial that they raise an inference of causation." 108 S.Ct. at 2789. In short, the disparity must suggest a "statistical significance," such that it is unlikely to have

occurred merely by chance and, therefore, if unexplained, may reasonably imply discrimination.<sup>12</sup>

In rebuttal, the employer must "produce evidence that its employment practices are based on legitimate business reasons." *Watson*, 108 S.Ct. at 2790.<sup>13</sup> Usually this should only require the employer to identify a facially plausible business reason for its judgment. Cf. *Dothard v. Rawlinson*, 433 U.S. at 340 (Rehnquist, J., concurring) (the employer in an impact case must "articulate the asserted job-related reasons underlying the [practice]"). See note 11 *supra* and accompanying text. It then falls to the plaintiff to prove a Title VII violation by showing that there exist other, less discriminatory decisionmaking practices that fulfill the employer's "business goals" equally as well, and at no greater cost or burden than the challenged practice. See *Watson*, 108 S.Ct. at 2790.

4. These carefully prescribed factors properly strike the balance mid-way along the continuum between what

<sup>12</sup> See, e.g., *Griggs*, 401 U.S. at 426 (the employment test had to "operate to disqualify Negroes at a substantially higher rate than white applicants") (emphasis added); *Albemarle*, 422 U.S. at 425 (plaintiffs were required to show "that the tests in question select[ed] applicants . . . in a racial pattern significantly different from that of the pool of applicants") (emphasis added); *Dothard*, 433 U.S. at 329 ("plaintiff need only show" that fixed standards "select[ed] applicants for hire in a significantly discriminatory pattern") (emphasis added); *Teal*, 457 U.S. at 446 ("significantly discriminatory impact") (emphasis added).

<sup>13</sup> Of course, before proceeding with this evidentiary stage, the employer may challenge the statistical premise of the *prima facie* case, and undermine any statistical inferences of causation. See *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); *Hazelwood School District v. United States*, 433 U.S. 299, 309-312 (1977).

traditionally has been called an adverse impact case (based on standardized tests or other fixed criteria) and a disparate treatment case (based on impermissible subjective criteria). In this middle ground, where amorphous qualities of subjective judgment come into play, it is especially important for this Court to guide both lower courts and litigants in the legal standards necessary to apply a *Watson*-type analysis. For these reasons, we believe that the Court should adopt as its holding the plurality's opinion in *Watson* and apply that analysis to the present case.

**C. The Ninth Circuit's Decision Reversing the Trial Court's Judgment for Petitioners Conflicts with the Plurality's Opinion in *Watson*.**

Turning to the current case, respondents attempted at trial to show that one or more of about sixteen challenged employment practices, either separately or together, violated Title VII.<sup>14</sup> After multiple appeals, the Ninth Circuit selected several practices as potential subjects for an adverse impact challenge: word-of-mouth recruitment, nepotism, separate hiring channels, housing messing and race labeling. *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 444-49 (9th Cir. 1987). Such broad, nebulous claims simply should not be allowed. In order to foster meritorious litigation and present an orderly case for trial, challenges to subjective decisionmaking must focus on the causative effects of "isolated" decisionmaking practices. Otherwise, "the only cost-effective means of avoiding expensive litigation" will be for employers to adopt illegal

<sup>14</sup> Petition for Certiorari at 5-6 & n.3.

and pernicious "quotes and preferential treatment [policies]." *Watson*, 108 S.Ct. at 2788.

1. *Statistics.* Respondents are "unskilled" cannery workers. The Ninth Circuit found that they produced *prima facie* evidence of discrimination simply by tendering numerical data of segregation in the workplace, vis-a-vis "skilled" positions. *Atonio*, 827 F.2d at 444. The Court of Appeals relieved the respondents of any burden to prove that there actually existed minority individuals qualified for the skilled positions they challenged. Instead, it held:

The statistics show only racial stratification by job category. This is sufficient to raise an inference that *some practice or combination of practices* has caused the distribution by race . . . .

827 F.2d at 444 (emphasis added).

The Ninth Circuit's holding does not comport with the corresponding test under *Watson*. First, evidence of "mere disparities in the employer's work force" will not establish a *prima facie* case. *Watson*, 108 S.Ct. at 2788; *id.* at 2797 & n.2 (Blackmun, J., concurring). Second, respondents' failure to "isolate" and "identify" the particular decisionmaking practice that *caused* the disparity is fatal to their case. *Id.* at 2788. They simply cannot allege a claim of adverse impact until they first identify a *specific* decisionmaking practice that causes discrimination. Finally, the Court of Appeals improperly relieved respondents of the obligation to show that minority individuals actually were qualified for the skilled jobs at issue.



2. *Specific Practices.* The Court of Appeals also reviewed petitioners' other claims of discrimination. However, respondents' failure to isolate specific objectionable decisionmaking practices, or produce statistical evidence sufficiently probative of causation based on race, renders their entire claim insufficient. At minimum, this Court should vacate the Court of Appeals' decision and remand for further findings in accordance with the plurality's analysis in *Watson*.

In so doing, this Court should stress the need for respondents to make a substantial statistical showing of discrimination as to each challenged employment practice. Moreover, petitioners have articulated legitimate business reasons for separate hiring channels (union versus non-union hiring),<sup>15</sup> informal recruitment (personal knowledge and hiring of skilled workers by application only),<sup>16</sup> separate messing facilities (culinary preference and union restrictions),<sup>17</sup> and separate housing facilities (seasonal requirements and workshift harmony).<sup>18</sup> Consequently, if respondents do establish a *prima facie* case, this Court should stress that to prevail they also must identify specific alternative practices that (1) fulfill the same business functions as the challenged practices, but that are neither (2) more costly or troublesome for the employer to imple-

<sup>15</sup> *Atonio*, 34 Empl. Prac. Dec. (CCH) 33,821, 33,827-28 (W.D. Wash. 1983) (findings 85-90, 94, 101-103).

<sup>16</sup> *Id.* at 33,827-28 (findings 87-89, 94); *id.* at 33,830 (findings 124-128).

<sup>17</sup> *Id.* at 33,836 (findings 143-147); *id.* at 33,844 (applying adverse impact test).

<sup>18</sup> *Id.* at 33,836 (findings 149A-149C); *id.* at 33,844 (applying adverse impact test).

ment, nor (3) needlessly intrusive of workplace management.

3. *Nepotism.* Finally, we raise a special concern about nepotism. Single acts of nepotism are unlikely to be illegal. *Cf. DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, — U.S. —, 108 S.Ct. 89 (1987) (rejecting Title VII claim where woman nurse was hired by her paramour, despite the presence of other qualified applicants). However, a nepotism policy or practice may be discriminatory where it is sufficiently pervasive. In such cases, the Ninth Circuit properly was concerned that if members of a predominant racial group hire only their own relatives, then "the practice necessarily has an adverse impact." *Atonio*, 827 F.2d at 445.

But in the current case, the trial court's finding of no discrimination should be sustained. The trial court found that "the [respondent's] nepotism figures failed to differentiate those persons who became related through marriage after starting work at the canneries." *Atonio*, 34 Empl. Prac. Dec. (CCH) 33,821, 33,840 (W.D. Wash. 1983) (emphasis in original). Moreover, the court found that "[r]elatives of whites and particularly nonwhites appear in high incidence at the canneries." *Id.* (emphasis added). Given these findings, it is difficult to see how respondents could possibly prove adverse impact because of race.

In sum, the evidence submitted by respondents at trial was insufficient to prove their adverse impact claim under any of this Court's prior holdings, and particularly under



the standards applicable to subjective decisionmaking that were articulated by the *Watson* plurality.

---

**CONCLUSION**

For the reasons expressed above, we believe that this Court should (1) reaffirm the plurality's suggestion in *Watson* that there exists a single analytical approach to deciding Title VII cases; (2) adopt the plurality's opinion as the proper mode of applying statistical evidence to subjective decisionmaking practices; and (3) vacate the decision below.

Respectfully submitted,

ARTHUR H. ABEL  
FAEGRE & BENSON  
2200 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 336-3000

CLINT BOLICK\*  
JERALD L. HILL  
MARK J. BREDEMEIER  
LANDMARK LEGAL FOUNDATION  
CENTER FOR CIVIL RIGHTS  
107 Second Street, N.E.  
Washington, D.C. 20002  
(202) 546-6045

\* Counsel of Record

10  
No. 87-1387

FILED

NOV 4 1988

JOSEPH E. SPANJOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COVE, INC.,

*Petitioners,*

—v.—

FRANK ATONIO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES  
UNION, NATIONAL WOMEN'S LAW CENTER,  
NOW LEGAL DEFENSE AND EDUCATION FUND,  
WOMEN'S LEGAL DEFENSE FUND,  
AMICI CURIAE, ON BEHALF OF RESPONDENTS**

JOAN E. BERTIN  
*Counsel of Record*  
KARY L. MOSS  
ISABELLE KATZ PINZLER  
JOHN A. POWELL  
American Civil Liberties  
Union Foundation  
132 West 43rd Street  
New York, New York 10036  
(212) 944-9800

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	iii
INTEREST OF <u>AMICI CURIAE</u> . . . . .	1
STATEMENT OF THE CASE . . . . .	2
SUMMARY OF ARGUMENT . . . . .	10
ARGUMENT . . . . .	13
Introduction . . . . .	13
I.    THE TOTALITY OF THE EVIDENCE INCLUDING STATISTICAL EVIDENCE OF RACIAL STRATIFICATION, EASILY ESTABLISHES A <u>PRIMA FACIE</u> CASE OF DISPARATE IMPACT DISCRIMINATION. . . . .	17
A.    Petitioners Have Failed to Demonstrate that Observed Disparities Are Attributable to Valid Skill or Qualifi- cations Requirements . . . . .	21
B.    The Data Comparing Non- White Representation In Cannery and Non-Cannery Jobs, Along with Other Evidence, Demonstrates the Impact of the Employers' Practices . . . . .	30



	<u>Page</u>
C. The Employers' Use of An Undifferentiated Hiring Procedure Makes the End Result Appropriate For a Measurement of Disparate Impact . . . . .	36
II. TITLE VII REQUIRES MORE THAN A SHOWING OF BUSINESS-RELATED PURPOSES TO DEFEND APPARENTLY DISCRIMINATORY EMPLOYMENT PRACTICES . . . . .	38
A. Congress Has Ratified This Court's Requirement That Employers Must Demonstrate the Business Necessity of Practices Which Result in Discrimination. . . . .	41
B. Decisions of This Court Reveal That the Business Necessity Defense Is An Essential Element of Disparate Impact Analysis . . . .	46
C. Cost Considerations Do Not Establish Business Necessity Or Excuse The Necessity To Prove It . . . . .	56
III. PRINCIPLES OF STARE DECISIS PRECLUDE ABANDONING OR ALTERING THE BUSINESS NECESSITY DEFENSE . . . . .	59
CONCLUSION . . . . .	63

<u>TABLE OF AUTHORITIES</u>	
	<u>Page</u>
<u>Cases</u>	
<u>Albemarle Paper Co. v. Moody</u> , 422 U.S. 405 (1975). . . . .	<u>passim</u>
<u>Alexander v. Choate</u> , 469 U.S. 287 (1985). . . . .	45
<u>Arizona Governing Comm. v. Norris</u> , 463 U.S. 1073 (1983). . . . .	32, 58
<u>Bazemore v. Friday</u> , 478 U.S. 385 (1986). . . . .	<u>passim</u>
<u>Beazer v. New York City Transit Authority</u> , 440 U.S. 568 (1979). . . . .	51
<u>Boston Chapter, NAACP, Inc. v. Beecher</u> , 504 F.2d 1017 (1st Cir. 1974), <u>cert. denied</u> , 421 U.S. 910 (1975). . . . .	47, 49
<u>Catlett v. Missouri Highway &amp; Transp. Comm'n</u> , 828 F.2d 1260 (8th Cir. 1987), <u>cert. denied</u> , ___ U.S. ___, 108 S.Ct. 1574 (1988). . . . .	16, 28, 54
<u>Caviale v. State of Wisconsin Department of Health and Social Security</u> , 744 F.2d 1289 (7th Cir. 1984). . . . .	48

Page

<u>Coble v. Hot Springs School District No. 6,</u> 682 F.2d 721 (8th Cir. 1982) . . . . .	54
<u>Connecticut v. Teal,</u> 457 U.S. 440 (1982). . . . .	<u>passim</u>
<u>Craig v. Alabama State Univ.,</u> 804 F.2d 682 (11th Cir. 1986). . . . .	10
<u>Crawford v. Western Electric Co.,</u> 614 F.2d 1300 (5th Cir. 1980). . . . .	27
<u>Davis v. Califano,</u> 613 F.2d 957 (D.C.Cir. 1979) . . . . .	24, 25
<u>De Medina v. Reinhardt,</u> 686 F.2d 997 (D.C.Cir. 1982) . . . . .	26, 28
<u>Dothard v. Rawlinson,</u> 433 U.S. 321 (1977). . . . .	40, 49, 50
<u>EEOC v. Radiator Specialty Co.,</u> 610 F.2d 178 (4th Cir. 1979). . . . .	24, 29, 35
<u>EEOC v. Rath Packing Co.,</u> 787 F.2d 318 (8th Cir.), <u>cert. denied</u> , 479 U.S. 910 (1986) . . . . .	16, 26
<u>Firefighters Institute for Racial Equality v. City of St. Louis,</u> 549 F.2d 506 (8th Cir.), <u>cert. denied</u> , 434 U.S. 819 (1977). . . . .	48

Page

<u>Fisher v. Procter and Gamble Manufacturing Co.,</u> 613 F.2d 527 (5th Cir. 1980), <u>cert. denied</u> , 449 U.S. 1115 (1981) . . . . .	23, 47, 48
<u>Franks v. Bowman Transportation Co.,</u> 495 F.2d 398 (5th Cir. 1974), <u>rev'd</u> , 424 U.S. 747 (1976) . . . . .	14, 24
<u>Gamble v. Birmingham Southern R. Co.,</u> 514 F. 2d 678 (5th Cir. 1975). . . . .	15, 22
<u>Gathercole v. Global Associates,</u> 545 F.Supp. 1280 (N.D.Cal. 1982) . . . . .	59
<u>Geller v. Markham,</u> 635 F.2d 1027 (2d Cir. 1980), <u>cert. denied</u> , 451 U.S. 945 (1981). . . . .	47
<u>General Bld. Contractors Ass'n v. Pennsylvania,</u> 458 U.S. 375 (1982). . . . .	32
<u>General Electric Co. v. Gilbert,</u> 429 U.S. 125 (1976) . . . . .	49, 61
<u>Grant v. Bethlehem Steel Corp.,</u> 635 F.2d 1007 (2d Cir. 1980), <u>cert. denied</u> , 452 U.S. 940 (1981). . . . .	47, 49
<u>Griggs v. Duke Power Co.,</u> 401 U.S. 424 (1971). . . . .	<u>passim</u>
<u>Grove City College v. Bell,</u> 465 U.S. 555 (1984). . . . .	61

	<u>Page</u>
<u>Guardians Ass'n of the New York City Police Dep't v. Civil Service Commission,</u> 463 U.S. 582 (1983) . . . . .	60
<u>Harless v. Duck,</u> 619 F.2d 611 (6th Cir.), <u>cert. denied</u> , 449 U.S. 872 (1980) . . .	48
<u>Harrell v. Northern Elec. Co.,</u> 672 F.2d 444 (5th Cir. 1982) . . .	24, 25
<u>Hawkins v. Bounds,</u> 752 F.2d 500 (10th Cir. 1985) . . .	48, 49
<u>Hayes v. Shelby Memorial Hospital,</u> 726 F.2d 1543 (11th Cir. 1984) . . .	48, 58
<u>Illinois Brick Co. v. Illinois,</u> 431 U.S. 720 (1977) . . . . .	60
<u>International Brotherhood of Teamsters v. United States,</u> 431 U.S. 324 (1977) . . . . .	<u>passim</u>
<u>Jones v. Lee Way Freight Inc.,</u> 431 F.2d 245 (10th Cir. 1970), <u>cert. denied</u> , 401 U.S. 954 (1971) . . .	14
<u>Kilgo v. Bowman Transp. Inc.,</u> 789 F.2d 859 (11th Cir. 1986) . . .	14, 16
<u>Kinsey v. First Regional Sec.,</u> 557 F.2d 830 (D.C.Cir. 1977) . . . . .	27
<u>Kirby v. Colony Furniture Co.,</u> 613 F.2d 696 (8th Cir. 1980) . . . . .	49

	<u>Page</u>
<u>Kirkland v. NY State Dep't of Correctional Services,</u> 520 F.2d 420 (2d Cir. 1975), <u>cert. denied</u> , 429 U.S. 823 (1976) . . . .	49
<u>Knight v. Nassau County Council Service Commission,</u> 649 F.2d 157 (2d Cir. 1981), <u>cert. denied</u> , 454 U.S. 818 (1982) . . . .	22
<u>Lewis v. Bloomsburg Mills, Inc.,</u> 773 F.2d 561 (4th Cir. 1985) . . . . .	50
<u>Los Angeles Dep't of Water &amp; Power v. Manhart,</u> 435 U.S. 702 (1978) . . . . .	.52, 58
<u>Marsh v. Eaton Corp.,</u> 639 F.2d 328 (6th Cir. 1981) . . . . .	.15
<u>McDonnell Douglas Corp. v. Green,</u> 411 U.S. 792 (1973) . . . . .	.49
<u>Mobile v. Bolden,</u> 446 U.S. 55 (1980) . . . . .	.61
<u>Monell v. Dep't of Social Services,</u> 436 U.S. 658 (1978) . . . . .	.60
<u>Muller v. U.S. Steel Corp.,</u> 509 F.2d 923 (10th Cir.), <u>cert. denied</u> , 423 U.S. 825 (1975) . . . . .	.22, 35
<u>Nash v. Consolidated City of Jacksonville,</u> 837 F.2d 1534 (11th Cir. 1988) . . . . .	50



	<u>Page</u>
<u>NLRB v. International Longshoremen's Ass'n, AFL-CIO,</u> 473 U.S. 61 (1985) . . . . .	60
<u>Nashville Gas Co. v. Satty,</u> 434 U.S. 136 (1977). . . . .	49
<u>Newport News v. EEOC,</u> 462 U.S. 669 (1983). . . . .	58
<u>New York City Transit Authority v. Beazer,</u> 440 U.S. 568 (1979). . . . .	51
<u>Orr v. Orr,</u> 440 U.S. 268 (1979). . . . .	53
<u>Parson v. Kaiser Aluminum &amp; Chemical Corporation,</u> 575 F.2d 1374 (5th Cir. 1978), <u>cert. denied,</u> 411 U.S. 968 (1979). . . . .	23
<u>Patsy v. Florida Board of Regents,</u> 457 U.S. 496 (1982). . . . .	60
<u>Robinson v. Lorillard Corp.,</u> 444 F.2d 791 (4th Cir.), <u>cert. dismissed,</u> 404 U.S. 1006 (1971) . . . . .	47, 49, 58
<u>Rowe v. General Motors Corp.,</u> 457 F.2d 348 (5th Cir. 1972) . . . . .	23, 48
<u>Shidaker v. Tisch,</u> 833 F.2d 627 (7th Cir. 1986), <u>cert. denied,</u> ____ U.S. ____, 108 S.Ct. 2900 (1988). . . . .	35

	<u>Page</u>
<u>Smallwood v. United Airlines Inc.,</u> 661 F.2d 303 (4th Cir. 1981), <u>cert. denied,</u> 456 U.S. 1007 (1982) . . . . .	58, 59
<u>Spurlock v. United Airlines, Inc.,</u> 475 F.2d 216 (10th Cir. 1972). . . . .	26
<u>Texas Dep't of Community Affairs v. Burdine,</u> 450 U.S. 248 (1981). . . . .	56
<u>Transworld Airlines, Inc. v. Thurston,</u> 469 U.S. 111 (1985). . . . .	30
<u>United States v. County of Fairfax,</u> 629 F.2d 932 (4th Cir. 1980) . . . . .	15, 28
<u>Walker v. Jefferson County Home,</u> 726 F.2d 1554 (11th Cir. 1984) . . . . .	48, 49
<u>Washington v. Davis,</u> 426 U.S. 229 (1976). . . . .	47
<u>Watson v. Fort Worth Bank &amp; Trust Co.,</u> 487 U.S. ____, 108 S.Ct. 2777 (1988). . . . .	17, 56
<u>Weeks v. Southern Bell Tel. &amp; Tel. Co.,</u> 408 F.2d 228 (5th Cir. 1969) . . . . .	51
<u>Wengler v. Druggists Mut. Ins. Co.,</u> 446 U.S. 142 (1980). . . . .	53
<u>Williams v. Colorado Springs School District,</u> 641 F.2d 835 (10th Cir. 1981) . . . . .	22, 23, 49

	<u>Page</u>
<u>Statutes</u>	
Civil Rights Restoration Act, Pub. L. 100-259 (1988) . . . . .	61
Pregnancy Discrimination Act, 42 U.S.C. §2000e(k). . . . .	57
Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (1982). . . . .	45
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 <u>et seq.</u> . . . . .	<u>passim</u>
Voting Rights Act, 42 U.S.C. §1973. . . . .	45

Legislative History and Other Authorities

Alaskan Fisheries Hearings: Hearings Before the Subcommittee on Alaskan Fisheries, Committee on the Merchant Marine and Fisheries, 76th Cong., 1st Sess. (1939) . . . . .	7, 9, 10
Committee on Labor and Human Resources, U.S. Senate, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (1979). . . . .	58
117 Cong. Rec. 31960 (1971). . . . .	44
117 Cong. Rec. 32095 (1971). . . . .	44
117 Cong. Rec. 32097 (1971). . . . .	44

	<u>Page</u>
117 Cong. Rec. 32101 (1971). . . . .	44
118 Cong. Rec. 7166 (1972). . . . .	43
House Report No. 238, 92d Cong., 1st Sess. (1971 . . . . .	43, 44, 45
Liljeblad, Filipino Alaska: A Heritage (1980) (Alaska Historical Commission Studies in History No. 9). . . . .	.9
S. Rep. No. 97-417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. and Ad. News 1 . . . . .	45

INTEREST OF AMICI CURIAE<sup>1/</sup>

Amici curiae are non-profit legal, education and research organizations concerned about the legal rights and economic status of women and minority workers.<sup>2/</sup>

Amici believe that this case has potentially far-reaching implications for the rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq. ("Title VII"). In particular, arguments pressed by petitioners and the United States, as amicus curiae, would, if accepted, seriously undermine the ability of any worker who has

---

<sup>1/</sup> The parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

<sup>2/</sup> The interest of each individual amicus curiae is set forth in the Appendix to this brief.



jected to discriminatory employment practices to receive the remedy Congress intended. We write especially to urge the Court to reject this unwarranted departure from established precedent.

#### Statement of the Case

This class action, filed in 1974, alleges employment practices that, individually and in combination, have created a patently racially stratified work environment at three Alaska salmon canneries. Among the elements contributing to this discriminatory result are (1) a history of job segregation; (2) recruitment practices which targetted non-whites for lower-paying jobs, while applicants for better jobs were sought from a predominantly white labor force; (3) rehire preferences, word-of-mouth hiring and nepotistic practices; (4) subjective hiring

practices; (5) segregation in the provision of housing and meals; and (6) common use of overt racial designations and characterizations.

The evidence reveals that non-whites were concentrated in lower-paying cannery jobs, and whites predominated in higher-paid positions. At Bumble Bee Cannery, more than 90% of all hires over a nine year period in seven of twelve departments were white. Non-whites predominated in only one department -- cannery worker -- and represented a third of hires in three other departments (laborer, culinary, quality control). Joint Excerpt of Record (hereinafter "ER") at 35. The same kind of stratification was evident at Red Salmon: whites obtained more than 75% of jobs in nine of twelve departments. Non-whites filled the majority of the laborer and

cannery worker positions. ER 36. At Wards Cove and Red Salmon, between a third and two-fifths of all hires were non-white, but they were largely confined to two departments -- cannery worker and culinary. ER 36, 37.

Even within apparently "integrated" departments, there was job segregation. At Bumble Bee, in the Fish House and Cannery departments, butcher and slimer jobs were filled exclusively by non-whites, and filler feeder and retort jobs were held almost exclusively by whites. ER 42. At Red Salmon, whites in the same department worked only in cold storage, fish weigher, and egg puller jobs, and non-whites held all other positions. ER 50; see also ER 54. At the Warehouse department at Wards Cove, whites represented 48% of the hires (N=28), but all except one were assigned to

the warehouse job category, while non-whites were spread throughout seven job categories. ER 55.

The "inexorable zero" is evident in the record as well. At Bumble Bee, in two job categories comprising 304 hires, no non-whites were hired at all from 1971 to 1980, and in five other categories, with 437 jobs at stake, non-whites obtained only 20 positions, fewer than 7% of the total. ER 35. At Red Salmon, no non-whites were hired into two job categories, involving 39 jobs; non-whites held only 11 out of 379 positions in three other departments. ER 36. At Wards Cove, in six job categories non-whites got only 16 of 614 jobs. ER 37.

The industry has traditionally employed non-white laborers for the hardest, least lucrative positions, a pattern that persisted well past the

passage of Title VII. The recruitment practices at issue in this case are particularly instructive. Non-whites were recruited specifically for cannery work, although there is no apparent reason why the employers did not make the full range of employment opportunities available to all potential applicants. Undoubtedly, many of the native Alaskans and Filipino workers recruited for cannery work would have preferred other jobs, especially if the pay and working conditions were better. But the preferred jobs were not offered, and inquiries about the availability of other positions were met by a variety of evasive responses.<sup>3/</sup> Higher-paying "at

---

<sup>3/</sup> For example, recruiters at Alaskan villages in the remote areas near the canneries were not authorized to accept applications for non-cannery work, Joint Appendix (hereafter "JA") at 163; and non-whites were actively discouraged from applying. JA 38-42; 52; 56-60; 63-67; 71-73; 75-77; 85-86; 125-126.

issue" jobs were generally filled through offices in Washington and Oregon, that drew from a predominantly white labor force, a practice that was common in the industry well before the institution of this lawsuit.<sup>4/</sup> Thus, by selectively controlling the labor market from which employees in different positions were drawn, the employers controlled the racial make-up of both the applicant pool and hires in various jobs.<sup>5/</sup>

Although certain skills are claimed as necessary for some "at issue" jobs, no

---

<sup>4/</sup> Alaskan Fisheries Hearings: Hearings Before the Subcommittee on Alaskan Fisheries, Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess. 58 (1939) (hereafter "Hearings").

<sup>5/</sup> By this practice, if the employers' argument is accepted, an employer may insulate itself from liability for discrimination by manipulating the labor pool: the comparative base used to measure discriminatory impact is the very labor force selected by the employer that has already produced the challenged result.



skill or education requirements were ever actually imposed.<sup>6/</sup> The desirable skills were identified only in preparation for litigation, and many of the incumbents did not possess them. Subjective judgments thus clearly controlled the selection of employees for "at issue" jobs, although the pool from which such employees were drawn largely excluded non-whites.

Overt discrimination was evident in the housing and meals arrangements and in the race-typing of jobs and workers. Many of the employment practices have changed little since the days when the cannery owners openly embraced and espoused race-based practices. A report by the Alaska Historical Commission observed:

---

<sup>6/</sup> Young inexperienced whites were commonly given jobs that petitioners now claim are "skilled." See, e.g., JA 19-24, 25-29, 35-37, 60-62, 78-79, 110-11, 114-22, 123-24, 131-36.

The cannery workers were divided into two groups, or crews, those that worked inside the canneries processing fish and those in cannery maintenance and operations.... [t]he fish and processing crew was mainly composed of racial and ethnic minorities, and after [the arrival of] Chinese contract laborers, it retained a primarily Oriental composition for decades. Sometimes Caucasians might be found within the "China" crew, yet the opposite was seldom found.<sup>7/</sup>

---

<sup>7/</sup> Sue Liljeblad, *Filipino Alaska: A Heritage* (1980) (Alaska Historical Commission Studies in History No. 9) (hereafter "Historical Report"). Race labeling and stereotyping dominated industry practices. Chinese were valued as "willing to work excessively long hours without grumbling, and are content to live in miserable quarters and the cheapest food." *Id.* at 100. A representative from the Territory of Alaska testified in Congress in 1939: "The oriental is not able physically to do the work of a white man, and I am sure it is the desire of the packer now to get rid of the Filipino.... If he has to pay a wage like that the packer feels he can get more work out of a white man and perhaps with less trouble...." Hearings, *supra* n.4, at 29. At the same time the white man was viewed as too good for the dirtiest work. "Some of the operators are of the opinion that white people would not generally prove satisfactory in the butchering crews. That is, the men who feed the iron chinks and slime the fish .... Some of them believe it would be necessary to use oriental labor in the butcher room, even if white labor were available and there was no restriction on employment." *Id.* at 346-47.

Originally shaped by intentionally discriminatory practices, the system challenged here incorporated elements of intentional discrimination, both covert and overt, along with identifiable neutral practices applied alike to whites and non-whites, that served to maintain the status quo.<sup>8/</sup>

#### SUMMARY OF ARGUMENT

The record in this case is replete with evidence that petitioners' employment practices have operated to freeze historical patterns of race discrimination. See Griggs v. Duke Power Co., 401 U.S. 424

---

Living accommodations were distributed on the basis of race or ethnicity with whites receiving the newest bunkhouses with the best lighting and conditions. Id. at 115-16.

<sup>8/</sup> For example, the rehire preference clearly serves to perpetuate current staffing patterns, Craig v. Alabama State Univ., 804 F.2d 682, 687 n.7 (11th Cir. 1986), and whites benefitted overwhelmingly from the nepotistic practices. ER 57-101.

0  
(1971), Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Yet petitioners ignore this overwhelming body of evidence, focussing their attack on only a small piece, and in so doing seriously distort the reality that workers in these Alaskan Salmon canneries experience.

This case recalls an earlier era of Title VII enforcement when race and sex typing in employment was rampant, often overt and institutionalized. Although the law has developed to address more sophisticated and subtle forms of discrimination, there is nothing sophisticated or subtle about this case. Only by viewing the totality of the evidence, Bazemore v. Friday, 478 U.S. 385 (1986), rather than forcing the facts into a legal straight jacket never intended for this kind of

situation, can this case be properly analyzed. See Point I, infra.

The rules and definitions established in Griggs, refined in Albemarle, and reaffirmed in Connecticut v. Teal, 457 U.S. 440 (1982), directly govern this case, and compel the conclusion that petitioners have wholly failed to rebut the evidence of discrimination or to demonstrate that their practices are justifiable. See also International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The defense consists of speculative attacks on plaintiffs' evidence, unsupported assertions of necessity, and hypothetical allegations as to the cost of improvements. Thus, petitioners and the United States propose dispensing with the authoritative interpretation of Title VII that has governed for 17 years, even though Congress

has expressly ratified this application of the statute. See Point II, infra.

Principles of stare decisis preclude the result petitioners urge. The Court should instead affirm its long-standing rule that practices "fair in form, but discriminatory in operation" are unlawful unless affirmatively justified as necessary to the business. See Point III, infra.

#### ARGUMENT

##### Introduction

Many industries have been marked by the pervasive stratification and stereotyping apparent in this case. Historically, for example, the trucking industry was stratified by race and sex. Whites predominated in the lucrative over-the-road ("OTR") tractor trailer driving jobs, while minorities were initially confined to certain shop positions and later obtained



employment driving local routes and working on the loading dock. See Teamsters, 431 U.S. at 337-38; Franks v. Bowman Transp. Co., 495 F.2d 398, 410 n.10 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). This allocation of jobs was maintained by a system of subjective and discretionary hiring practices, often in combination with neutral rules, like no-transfer provisions, that operated to freeze and perpetuate the discriminatory practices. See also Kilgo v. Bowman Transp. Inc., 789 F.2d 859, 869-75 (11th Cir. 1986) (women excluded from OTR driving jobs as a result of a neutral prior experience requirement and other practices, including unequal and inconsistent application of job require-

ments, failure to provide adequate bathroom and bunk facilities, and other practices designed to deter women applicants).

The same patterns occurred in many settings. Whites entered the preferred lines of progression, and minorities and women were routed to race and sex-typed positions, often the lowest paid, with the least likelihood of advancement.<sup>9/</sup> Subjective assessments, selective recruitment, experience and education requirements, and paper and pencil tests were all employed, often simultaneously.

---

<sup>9/</sup> E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ("racial identifiability" of lines of progression; blacks in worst jobs); United States v. County of Fairfax, Va., 629 F.2d 932, 937-38 (4th Cir. 1980) (women clustered in clerical jobs, minorities in maintenance); Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678 (5th Cir. 1975) (blacks confined to switchman position); Marsh v. Eaton Corp., 639 F.2d 328 (6th Cir. 1981) (women channeled into specific jobs).

Vigorous enforcement of Title VII, and judicial scrutiny of employment practices that resulted in marked workforce stratification has made this a less familiar, but by no means non-existent, pattern. Women workers, in particular, are still subject to stereotypes about their interests and skills and to pervasive discrimination in male-dominated industries and professions. See, e.g., Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260 (8th Cir. 1987) cert. denied, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1574 (1988); EEOC v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir.), cert. denied, 479 U.S. 910 (1986); Kilgo v. Bowman Transp. Inc., 789 F.2d 859. No one familiar with the efforts to eradicate widespread employment discrimination, to which Title VII was originally dedicated, can fail to recognize the

pattern present in this case. This case, like Griggs, 401 U.S. 424, and Albemarle, 422 U.S. 405, had its genesis in the overtly discriminatory practices pursued widely in this industry prior to the enactment of Title VII. And, like Griggs and Albemarle, this case also involves neutral practices, applied to all, that fall more harshly on one group and that "operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs, 401 U.S. at 430.<sup>10/</sup>

I. THE TOTALITY OF THE EVIDENCE, INCLUDING STATISTICAL EVIDENCE OF RACIAL STRATIFICATION, EASILY ESTABLISHES A PRIMA FACIE CASE OF DISPARATE IMPACT DISCRIMINATION.

---

<sup>10/</sup> There can be no doubt in this case that the "racial identifiability" of jobs, Albemarle, 422 U.S. at 409, did not arise from a "myriad of innocent causes," Watson v. Fort Worth Bank & Trust Co., 487 U.S. \_\_\_, 108 S.Ct. 2777 (1988), but from an extended history of specific discriminatory practices.

The parable of the blind describing an elephant<sup>11/</sup> is an apt metaphor for the mischaracterization of this case by petitioners and some supporting amici. By focussing their attack on a single element of the case, namely the comparison between the proportion of non-whites in cannery jobs and non-whites in better paying, more desirable "at issue" jobs, as if no other evidence exists, the employers distort reality. The record establishes pervasive evidence of discrimination, of which this particular statistical

---

<sup>11/</sup> Several blind people stationed at various points around an elephant are each separately asked to describe the beast. The one at the trunk reports that an elephant is a large hose; the one at the tusk describes a curved spike; another at the ear says the elephant resembles a sail; the one feeling the body says an elephant is a large hairy wall, and according to the one at the tail an elephant seems to be a sort of rope with a tassel at the end. Here, the employers and their amici are all feeling the tail; they perceive no elephant, only a rope.

comparison is only a part: discrimination is apparant "by the manner in which [an employer] publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups." Teamsters, 431 U.S. at 365.

Petitioners do not contest many of the facts upon which respondents rely, but they question the relevance and probative value of this evidence and assert that some of the practices are defensible. Specifically, the employers do not deny that general hiring, hiring of relatives, recruitment, rehire, bunking and messing practices occur essentially as respondents describe them. They claim that there is no



statistical evidence of discrimination, because they allegedly hire in proportion to the "qualified" labor pool.

Both parties attempted to define the appropriate comparative reference to measure statistically the significance of the obvious racial stratification in the labor force, and there was and is sharp dispute on this issue. This dispute, however, should not obscure the agreement regarding the other factual elements of the employment process (even if the legal implications are debated), and the fact that these elements can and should be considered in determining the existence of the prima facie case. Cf. Bazemore v. Friday, 478 U.S. at 400.

The dispute over the statistical evidence of impact ultimately involves two questions: (1) whether qualifications that

have not actually been uniformly applied in the selection of employees and that themselves may disproportionately exclude non-whites may be used to define the relevant labor pool for purposes of statistical evidence of impact; and (2) whether the employers may themselves manipulate the labor pool, by selectively seeking employees for some jobs in a predominantly white area and employees for other jobs in predominantly non-white areas.

A. Petitioners Have Failed to Demonstrate that Observed Disparities Are Attributable to Valid Skill or Qualifications Requirements

Evidence of racial, ethnic, or sex-based stratification in employment compellingly suggests the presence of discriminatory practices or the residue of intention-

al, historical discrimination.<sup>12/</sup> Such stratification is unlikely to occur as a result of choice when the jobs to which minorities or women are confined are the least desirable ones. It is equally unlikely that qualifications or skills fully account for the disparities, especially in the jobs "at issue" in this case: until this litigation, the employer had no defined requirements for the jobs, and many of the incumbents were unskilled. The selection process for at issue jobs was highly subjective.<sup>13/</sup> Under these

---

<sup>12/</sup> E.g., Gamble v. Birmingham So.R. Co., 514 F.2d 678 (5th Cir. 1978); Muller v. U.S. Steel Corp., 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975). See also Albemarle, 422 U.S. 405 and Griggs, 401 U.S. 424.

<sup>13/</sup> The failure to articulate objective criteria, and the reliance on unguided subjective decisions, has often been identified as a ready mechanism for discrimination. Knight v. Nassau County Civil Service Commission, 649 F.2d 157, 161 (2d Cir.), cert. denied, 454 U.S. 818 (1981); Williams v. Colorado Springs School District, 641

circumstances, the skill level, for purposes of identifying comparative labor force data, must be based on the "non-discriminatory standards actually applied ... to individuals who were in fact hired." Franks v. Bowman Transp. Co., 424 U.S. at 772 n.32. See also Albemarle, 422 U.S. at 433. Since the evidence demonstrates that no standards were developed or consistently applied to actual hires, labor force comparisons cannot be restricted by hypothetical skill levels. Indeed, the notion that the Beach Gang truck driver job is a "skilled" job conflicts with this Court's repeated statements, in the context

---

F.2d 835, 842 (10th Cir. 1981); Fisher v. Procter and Gamble Manufacturing Co., 613 F.2d 527, 546 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981); Parson v. Kaiser Aluminum and Chemical Corporation, 575 F.2d 1374, 1385 (5th Cir. 1978), cert. denied sub. nom. Local 13000, U.S. Steelworkers of America v. Parson, 441 U.S. 968 (1979); Rowe v. General Motors Corporation, 457 F.2d 348, 359 (5th Cir. 1972).

of OTR trucking cases, that this is a skill widely possessed or easily obtained. See, e.g., Franks and Teamsters.

It is hard to imagine that driving a truck around a cannery requires more skill than driving an 18 wheel tractor-trailer across country. Similarly, it is hard to understand why Alaskan native Americans are deemed not sufficiently skilled to cook on board fishing boats, or to be deckhands. They lack the requisite "skill" level, according to petitioners, because they have previously been excluded from these jobs.

It is the defendant's burden to prove the necessity of special qualifications, if they are in doubt. EEOC v. Radiator Specialty, Co., 610 F.2d 178, 185 n.8 (4th Cir. 1979); Davis v. Califano, 613 F.2d 957, 964-65 (D.C. Cir. 1979); Harrell v. Northern Elec. Co., 672 F.2d 444, 448 (5th

Cir. 1982). Where the very subjectivity of the practice is challenged as contributing to, or creating, the discriminatory result, numerous courts have held that comparative labor force data may be limited only by reference to the "minimum objective qualifications" for the job. Davis v. Califano, 613 F.2d at 964. There were no minimum objective qualifications for the jobs at issue in this case because none had been identified and none was uniformly required.

Furthermore, prior experience and skill requirements would themselves be discriminatory. Defining the labor pool according to discriminatory standards would be entirely inappropriate:

The circuitousness of this bootstrap argument becomes obvious when one recalls that it is [the] qualifications for flight officer that appellant claims are discriminatory.



Spurlock v. United Airlines, 475 F.2d 216, 218 (10th Cir. 1972) (emphasis in original).<sup>14/</sup> In such a case, it would be unreasonable to require plaintiffs to rely on the very data that "may be biased against them." De Medina v. Reinhardt, 686 F.2d 997, 1010 n.8 (D.C. Cir. 1982).

Lower federal courts are virtually unanimous in imposing on employers the burden of proving the existence and/or necessity of special job qualifications or skills where the requirements are not uniformly imposed, where they are not clearly justifiable, or where they may themselves cause or contribute to discriminatory exclusions. See EEOC v. Rath Packing Co., 787 F.2d at 327, 336 ("Rath could not

---

<sup>14/</sup> In Spurlock, the court held that a prima facie case was established through evidence of the "minuscule" number of blacks employed, and that the employer bore the burden to justify the job qualifications

identify any criteria it used in selecting employees or any common qualifications or skills that its employees possessed"); Crawford v. Western Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980) ("an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion procedure is challenged as discriminatory"); Kinsey v. First Regional Securities, 557 F.2d 830, 837-38 (D.C. Cir. 1977) ("objective criteria" had not been uniformly applied; skill requirements should be scrutinized if the evidence showed systematic exclusion of blacks).

Petitioners further assume that skills and qualifications are unevenly distributed in the population on the basis of race or ethnicity. The "more logical assumption,"

however, is that skills of the sort involved in this case<sup>15/</sup> are evenly distributed. De Medina v. Reinhardt, 686 F.2d at 1008 n.7; United States v. County of Fairfax, 629 F.2d at 939. The employer bears the "burden of producing evidence from which it is possible to evaluate the likelihood that the disproportionate impact was caused by unequal qualifications." De Medina, 686 F.2d at 1009 n.7 (quoting D. Baldus and I. Cole, Statistical Proof of Discrimination 194-195 (1980)). See also Catlett v. Missouri Highway & Transp. Comm'n., 828 F.2d at 1266 (employers burden to show that statistical disparity results from women's lack of interest).

---

<sup>15/</sup> The skill level, to the extent it exists, is of the experiential sort, commonly available to all groups. Unlike brain surgeons and rocket scientists, societal discrimination does not operate against non-whites in these categories, but rather fosters their participation.

In sum, the assertion that skills, qualifications, or interest level precludes the statistical comparisons undertaken by respondents is neither apparent from the nature of the jobs nor is it factually supported in the record. The burden was on the employers to prove the existence of minimum, objective qualifications actually applied during the relevant period to individuals actually hired so that respondents could, if necessary, adjust their statistical presentation. EEOC v. Radiator Specialty, 610 F.2d at 185-86. Absent this showing, respondents' statistical data cannot be rejected or discounted for failing to account for spurious or hypothetical skills and qualifications that are allegedly lacking

in the excluded class and that may themselves foster discrimination.<sup>16/</sup>

B. The Data Comparing Non-White Representation In Cannery and Non-Cannery Jobs, Along With Other Evidence, Demonstrates the Impact of the Employers' Practices

Petitioners and the United States challenge the Ninth Circuit's reliance on the patent racial stratification in this workforce in finding a prima facie case.<sup>17/</sup> To make this argument, they are

---

<sup>16/</sup> Indeed, some plaintiffs and class members had college educations, JA 52, 56-60, 63-67, 71-73, 75-77, 85-86, but were apparently not deemed sufficiently qualified to work in the Beach gang, quality control, clerical, or other jobs.

<sup>17/</sup> The court may well have considered this evidence in the context of other evidence in the record, since nothing in the opinions below suggests that the court relied solely on that evidence. Whether or not the Court of Appeals considered the totality of the evidence, respondents are, of course, entitled to assert any ground for affirmance of the judgment in their favor. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 119 n.14 (1985). The totality of the evidence is clearly the appropriate standard to determine the existence of a prima facie case. Bazemore v. Friday, 478 U.S. at 400-01.

forced to rely on petitioners' own practices - the very subject of this lawsuit - to construct an argument that this evidence is irrelevant. In particular, petitioners rely on their practice to hire from outside the workforce to fill non-cannery jobs to justify the contention that comparisons to the external labor market are more relevant than internal comparisons. The government relies, ultimately, on the claim that use of Local 37 as a referral source results in the "overrepresentation" of non-whites in cannery jobs, distorting any comparison between that group and non-cannery hires. Neither addresses the anomaly their arguments suggest: that the employers' own challenged acts become the basis for defeating liability. Both ignore the fact that it was the employers' own decision to



hire for non-cannery jobs through offices in Washington and Oregon, and that the labor agreement with Local 37 gave management the exclusive right to select new hires.<sup>18/</sup> The rehire preference compounded the harmful effects of this management prerogative.

The contention that non-whites are "overrepresented" is itself ironic: both the government and petitioners claim that application of Griggs will "force" employers to adopt "quotas" to avoid potential liability. Both now seek the benefit of a "ceiling" quota. They argue

---

<sup>18/</sup> This fact distinguishes this case from General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982), in which the union was the exclusive referral source and the sole agent found liable for intentional discrimination under 42 U.S.C. §1981. Compare Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1089 & n.21 (1983) (employers gain no immunity by delegating tasks to third parties where "employers are ultimately responsible").

that their practices should be insulated from liability so long as their hiring is proportionate with the appropriate labor pool as they define it, whether or not the practices impact more heavily on non-whites than whites.<sup>19/</sup>

In any event, the record is devoid of any factual verification for the claim that non-whites are "overrepresented." In fact, the high proportion of non-whites may as easily reflect the fact that whites, having more options, are less willing to do this hard, seasonal work in remote locations. These factors, far from supporting the "overrepresentation" theory, suggest that the best comparison available is the actual workforce, a figure that avoids speculation about which elements of the labor force

---

<sup>19/</sup> This contention has already been rejected by this Court. Connecticut v. Teal, 457 U.S. 440 (1982).

might be available for or interested in this employment.

The other comparative data all suffer serious, if not fatal, flaws. The district court's own characterization of census data<sup>20/</sup> reveals why census figures are singularly inappropriate: they are largely comprised of individuals in year-round, fixed location jobs near their place of residence; the canneries are located in remote, sparsely-populated regions and provide only seasonal employment. There is no apparent relevance of this data to this case, and the district court provided no rationale for its acceptance. The finding

---

<sup>20/</sup> The district court noted that census data is "dominated by people who prefer full-year, fixed-location employment," but nonetheless found that "such data is nevertheless appropriate in defining the labor supplies for migrant seasonal work." Fdg.120, 34 CCH Empl. Prac. Digest ¶34,437, p.33,829. Why such data is "appropriate" is not explained.

in this regard is simply devoid of any foundation and is clearly erroneous.

Especially in the absence of minimum objective qualifications, the apparent restriction of minorities and women to lower paying less desirable jobs has often been viewed by the courts as highly probative evidence of discrimination, and sufficient to support a prima facie case. See Shidaker v. Tisch, 833 F.2d 627 (7th Cir. 1986), cert. denied, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2900 (1988); EEOC v. Radiator Specialty Co., 610 F.2d at 181-82, Muller v. U.S. Steel Corp., 509 F.2d 923. A "plaintiff in a Title VII suit need not prove discrimination with scientific certainty." Bazemore v. Friday, 478 U.S. at 400 (Brennan, J., concurring).

The evidence of racial stratification does not exist in a vacuum, and the

totality of the evidence clearly supports the finding of a prima facie case of discrimination Id. at 401-02.

C. The Employers' Use of An Undifferentiated Hiring Procedure Makes the End Result Appropriate For a Measurement of Disparate Impact

Petitioners contend that the plaintiffs improperly relied on the "cumulative effects" of their employment practices and that, having failed to demonstrate the individual impact of each specific practice, their challenge must fail. Having created a multifactorial selection process, with subjective elements and unweighted components, the employers cannot assert that the system is immune from attack because it does not have separate, scored or weighted factors whose impact can be separately and independently ascertained.

In some cases, it might be entirely appropriate to require a plaintiff to demonstrate the discriminatory effect of identifiable criteria by which employees or applicants are selected. For example, police departments commonly subject new potential recruits to paper and pencil tests, medical examinations, physical ability tests, and background inquiries. Each one of these pre-employment hurdles is scored: a certain number of applicants are eliminated, the remaining may be ranked. The system contains both objective and subjective elements. Those who would challenge its validity may reasonably be expected to identify where the discrimination, if any, occurred, because in such a system the effects of each aspect of the screening process can be separately



ascertained. Cf. Connecticut v. Teal, 457 U.S. 440.

But where the elements of the hiring process are not so clearly identifiable and applicants neither pass, fail nor score at any point until the end of the process when they are either hired or not, the only reasonable target for challenge is the result of the process. Even the United States recognizes that in such a situation the impact of each element in a multifactorial process cannot be demonstrated.<sup>21/</sup>

II. TITLE VII REQUIRES MORE THAN A  
SHOWING OF BUSINESS RELATED  
PURPOSES TO DEFEND APPARENTLY  
DISCRIMINATORY EMPLOYMENT  
PRACTICES

---

<sup>21/</sup> In its brief, at p.22, the government concedes that "if [multiple] factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole."

Flouting seventeen years of Title VII jurisprudence, and Congressional ratification of that caselaw, the employers and the government in this case advocate abandonment of the central tenet of Griggs: that equal employment opportunity may not be offered "merely in the sense of the fabled offer of milk to the stork and the fox, ...[but] that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes ... practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." 401 U.S. at 431 (emphasis added).

Instead, the employers argue that they should be able to defend their practices simply by offering "reasonably clear and specific" reasons. Petitioner's Brief at 39; see also U.S. Brief at 27. In fact,

the government would dispense with Griggs entirely: "Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases." Id; see also Petitioner's Brief at 47 ("Indeed, the rigid formula of Griggs itself should be reexamined in this context").

Thus, the government suggests that employers should be able to defend discriminatory practices for any reason other than "non-business," U.S. Brief at 24-25, & n. 35. It would accept an employer's sincere but unsupported assertions.<sup>22/</sup> It

---

<sup>22/</sup> Indeed, the employer and United States characterize the defendant's burden as one of production despite decisions by this Court stating that the burden is one of proof. Albemarle, 422 U.S. at 425 ("the company must meet the burden of proving that its tests (were) job related"); Dothard v. Rawlinson, 433 U.S. at 329 (the defendants failed "to prove that the challenged requirements are job-related"). See also Connecticut v. Teal, 457 U.S. at 451 (employers must "demonstrate that the examination given was not an artificial,

was precisely this contention that this Court rejected over fifteen years ago when it held in Griggs that the employer's attempt to improve the overall quality of the workforce through educational and testing requirements, a "reasonably clear and specific" business related purpose, failed to provide an adequate defense. Stare decisis precludes such a departure from established law, ratified by Congress.

A. Congress Has Ratified This Court's Requirement That Employers Must Demonstrate the Business Necessity of Practices Which Result in Discrimination.

In 1971 this Court expressly rejected Duke Power Company's defense that its educational and testing requirements, adopted in response to the increasing complexity of its business, served a  

---

arbitrary, or unnecessary barrier, because it measured skills related to effective performance....")

"legitimate business purpose": the company wanted to improve its efficiency and have some assurance that employees would be able to advance through the ranks.

In Griggs, the Court determined that the statutory exemption for professionally developed tests, 42 U.S.C. §2000e-2(h), did not shield Duke Power since the test had been "used to discriminate," as demonstrated by its effect on blacks. Such tests, like other neutral practices with disproportionately adverse effects, could only be justified if the employer could show a "manifest relationship" to successful job performance or business necessity. Id. at 433.

The same year, Congress expressly endorsed the Griggs interpretation of Title VII, retaining the statutory language cited in Griggs. The House Report also ex-

plicitly quoted Griggs<sup>23/</sup> and endorsed both the effects test and the holding that an employer's good faith could not defeat a finding of discrimination, if the employer failed to prove the existence of an overriding business necessity. H.R. 92-238, 92d Cong. 1st Sess. 8 (1971).<sup>24/</sup> The Court has itself recently acknowledged that "Congress recognized and endorsed the disparate impact analysis employed by the Court in Griggs." Connecticut v. Teal, 457 U.S. at 447 n. 8.

---

<sup>23/</sup> See, e.g., H.R. 92-238, 92d Cong. 1st Sess. 8, 21 (1971) (specific reference to "business necessity" as "touchstone").

<sup>24/</sup> Congress further incorporated Griggs by providing that: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated... present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166, 7564 (1972).



Nor does legislative history provide any basis for relaxing Griggs' requirements in cases involving subjective employment practices. The legislative history of the 1972 amendments is replete with examples of racial stratification in upper level positions, positions where subjective criteria are most likely to be used.<sup>25/</sup>

Recognizing the increasingly subtle and complex nature of discrimination, the legislative history refers to "systems and effects." The House Report included within the ambit of prohibited "systems" practices relating to seniority, lines of progression, practices which perpetuate the

---

<sup>25/</sup> For example, the concentration of minorities and women in the lowest paying and least desirable jobs was particularly noted: H.R. 92-238, 92d Cong., 1st Sess. 23 (1971). 117 Cong. Rec. 31960 (9/15/71) (remarks of Rep. Perkins); 117 Cong. Rec. 32095 (9/16/71) (remarks of Rep. Faunteroy); 117 Cong. Rec. 32097 (9/16/71) (comments of Rep. Abzug); 117 Cong. Rec. 32101 (9/16/71) (comments of Rep. Badillo).

present effects of earlier discrimination through various institutional devices, as well as testing and validation requirements. H.R. 92-238, 92d Cong. 1st Sess. 8 (1972).

The rule of law enunciated in Griggs has been adopted by Congress on other occasions, as well, in defining prohibited discrimination. For example, it has been used to define conduct prohibited by the Voting Rights Act as well as the Rehabilitation Act.<sup>26/</sup> In sum, Congress has on several occasions relied upon, and

---

<sup>26/</sup> The legislative history of the Voting Rights Act Amendments of 1982, 97 P.L. 205, 96 Stat. 131 42 U.S.C. §1973 (1982), shows express reliance on Griggs: "the results test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions". S. Rep. No. 97-417, 97th Cong., 2d Sess. at 17, reprinted in 1982 U.S. Code Cong. and Admin. News 193-94. Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (1982), has been similarly held to incorporate Griggs standards. Alexander v. Choate, 469 U.S. 287 (1984).

endorsed, the Griggs decision, as interpreted in this and lower federal courts. An integral part of that decision is the insistence on business necessity as the standard by which practices, "fair in form but discriminatory in operation," must be justified.

B. Decisions of This Court Reveal That the Business Necessity Defense Is An Essential Element of Disparate Impact Analysis

Like Congress, this Court has consistently affirmed the rule of Griggs as originally enunciated, including its insistence on business necessity as the standard by which discriminatory practices must be judged. Thus, this Court has held that employment practices which "operate as 'built-in headwinds'" must be validated and "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with' important elements

of work behavior which comprise or are relevant to the job...." Albemarle, 422 U.S. at 431 (quoting 29 C.F.R. §1607.4 (c)). The Court has specifically emphasized Title VII's rigorous burden:

it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary in addition, that they be 'validated' . . . . However this process proceeds, it involves more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators."

Washington v. Davis, 426 U.S. 229, 247 (1976) (emphasis added) (distinguishing constitutional cases). 27/

27/ Lower courts have consistently required that a defendant provide professional or empirical validation for their discriminatory practices. Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1022 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (rejecting written test for firefighters); Grant v. Bethlehem Steel, 635 F.2d 1007, 1015 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); Geller v. Markham, 635 F.2d 1027, 1032-1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) (cost concerns rejected); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); Fisher v.

Allegations of good faith will not rebut a prima facie case of class-wide discrimination. Griggs, 401 U.S. at 431, and see Teamsters, 431 U.S. at 342 n.24. Nor will a desire to hire only the best qualified applicants. Id. Instead, the employer has to show that the challenged practices are of "great importance" or of a "compelling nature." Connecticut v. Teal,

---

Procter and Gamble Manufacturing Co., 613 F.2d 527, 544-45 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981) (qualifying tests and experience); Rowe v. General Motors Company, 457 F.2d 348, 358 (5th Cir. 1972) (rejecting "ebb and flow" in production level); Harless v. Duck, 619 F.2d 611, 616-617 (6th Cir.), cert. denied, 449 U.S. 872 (1980) (physical ability test and oral interview); Caviale v. State of Wisconsin Department of Health and Social Serv. 744 F.2d 1289, 1294-95 (7th Cir. 1984) (requirement that applicants be members of Career Executive Program); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 511 (8th Cir.), cert. denied, 434 U.S. 819 (1977) (promotional exam); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (discriminatory detailing); Walker v. Jefferson County Home, 726 F.2d 1554, 1559 (11th Cir. 1984); Hayes v. Shelby Memorial Hospital, 726 F.2d 1543, 1553 n.15 (11th Cir. 1984) (potential litigation costs).

457 U.S. at 451. 28/ Accord Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977); Dothard v. Rawlinson 433 U.S. at 331; General Electric Corp. v. Gilbert, 429 U.S. at 138 n.14 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

Contrary to the government's and the petitioners' suggestion, the business necessity defense is an "affirmative defense," entirely distinct from the "much less burdensome riposte... applicable to

---

28/ See also Hawkins v. Bounds, 752 F.2d 500 ("great importance"); Grant v. Bethlehem Steel, 635 F.2d 1007 ("genuine business need"); Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980) ("compelling need"); Walker v. Jefferson County Home, 726 F.2d at 1559 ("rigorous standard"); Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 426 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976) ("heavy burden"); Boston Chapter, NAACP v. Beecher, 504 F.2d at 1024 ("substantially related" by "convincing facts"); Robinson v. Lorillard, 444 F.2d at 798 ("sufficiently compelling"); Williams v. Colorado Springs School District, 641 F.2d 835, 842 (10th Cir. 1981) ("the practice must be essential, the purpose compelling").



individual disparate treatment cases."

Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 571-72 (4th Cir. 1985). Articulation of a legitimate non-discriminatory reason "simply has no doctrinal relevance as a negating or justifying defense to statistically proven patterns and practices of discrimination ... [it is] 'about as relevant as a minuet is to a thermonuclear battle.'" Id. at 572 n.19 (citation omitted.) Accord Nash v. Consolidated City of Jacksonville, 837 F.2d 1534, 1536 (11th Cir. 1986).

If the position now advocated by the government and the employers were the law, Title VII would have done little to desegregate the workplace. For example, the employer in Dothard may have sincerely believed that height and weight correlated with effectiveness as a corrections

officer, but that belief was not factually supported. If a lower level of proof -- merely assertion of a business purpose -- had been accepted, women would still be virtually excluded from law enforcement jobs, many factory jobs, and other positions for which size has been wrongly assumed to be relevant.<sup>29/</sup> See also Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) ("using these class stereotypes denies desirable

---

<sup>29/</sup> On only one occasion has the Court even arguably excused the usual validation requirement. In New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), the Court noted that plaintiffs' statistical data was "weak," possibly not even sufficient to establish a prima facie case. Id. at 587. Under these circumstances, the Court found the restriction of methadone users from "safety sensitive" positions was job-related. Id., n.31. The ultimate holding was contained in a footnote: "Whether or not respondents' weak showing was sufficient to establish a prima facie case, it clearly fails to carry respondents' ultimate burden..." Id. This decision provides no basis for the conclusion that the Court has dispensed with the business necessity requirement in response to a prima facie case of discrimination.

positions to a great many women perfectly capable of performing the duties involved").

A simple explanation fails to rise to the level of the evidence of systematic discrimination inherent in a *prima facie* case of class-wide discrimination. Any employer can always articulate some business-related reason for its practices, but that does nothing to address the systematic impact of discriminatory practices. Title VII's focus is and should be on the eradication of practices that inhibit equal employment opportunity, regardless of motive.<sup>30/</sup>

---

<sup>30/</sup> Indeed, business related purposes have been advanced to justify even facially discriminatory practices, and the asserted non-invidious motives were most likely genuine. *E.g., Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Sex discrimination cases reveal the irrelevance of bigotry or animus to a finding of discrimination. Invidious discrimination against women has historically been characterized

Statistical data may always be challenged as irrelevant, unreliable or inaccurate, because the plaintiff's *prima facie* case can always be attacked directly. Class disparate treatment cases best define this process: the defendant must produce its own statistical analysis, or valid statistical critique, demonstrating why the statistics are incorrect or unworthy of credibility. *Teamsters*, 431 U.S. at 340. In reviewing the statistical data in *Bazemore v. Friday*, the Court noted that the defendants failed to provide "evidence to show that there was in fact a disparity":

---

by benign motives. The Supreme Court has invalidated intentional discrimination even where the intent was "to favor [women], not to disfavor them." *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980). See also *Orr v. Orr*, 440 U.S. 268 (1979) (alimony statute which benefitted only women invalidated as unconstitutional intentional discrimination).

Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of-statistical or otherwise-to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.

478 U.S. at 403-04 n.14 (references omitted) (Brennan, J., concurring).

As Bazemore thus makes clear, affirmations of good intentions do not refute a statistical showing of discrimination - only facts suffice.<sup>31/</sup>

Failing refutation of the statistical evidence, an employer is free to prove the business necessity of practices with

---

<sup>31/</sup> "[H]ypotheses or conjecture will not suffice" to rebut statistical evidence of discrimination. Cable v. Hot Springs School Dist., 682 F.2d 721, 730 (8th Cir. 1982) (citation omitted). Catlett v. Mission Highway & Transp. Comm., 828 F.2d at 1266 (defendant may not rely on "mere conjecture or assertion" but must produce "direct evidence").

discriminatory impact.<sup>32/</sup> Here, the employers offered little other than assertions of their own good faith and the business related purposes that were allegedly served.<sup>33/</sup>

In the context of both disparate impact and class disparate treatment cases, this Court has squarely and consistently rejected the assertions of business-related purposes to rebut a discrimination claim that relied in whole or in part on class-

---

<sup>32/</sup> The job analysis prepared in this case is unavailing, since it is conceded that the qualifications had not been previously identified or required. Validation undertaken in preparation for litigation is always subject to particular scrutiny. Bazemore, 422 U.S. at 433 n.32. Moreover, the study was materially defective in that it did not attempt to correlate important elements of work behavior with the job qualifications identified. This is legally insufficient. Id. at 431-32.

<sup>33/</sup> The district court accepted these mere "articulations" but the court failed to apply disparate impact and these conclusions were thus governed by an incorrect legal standard.



wide statistical evidence of discrimination. <sup>34/</sup>

C. Cost Considerations Do Not Establish Business Necessity Or Excuse The Necessity To Prove It

The employers and the government contend that the potential costs of non-discrimination should excuse discriminatory practices, in essence arguing that the assertion of a cost-based rationale should

---

<sup>34/</sup> To the extent that petitioners and the government rely on the opinion of four members of the Court in Watson v. Fort Worth Bank & Trust Co., 487 U.S. \_\_\_, to support the conclusion that an "articulation" defense is appropriate in this case, that reliance is misplaced. Watson involved a single individual claimant who asserted that blacks were disproportionately affected by the bank's subjective promotion practices. The Court held that she could proceed on such a theory. It had no occasion to address the burden on a defendant in response to evidence of class-wide discrimination. This Court's decisions have always distinguished between individual and class disparate treatment cases with regard to both the prima facie case and the defense. Compare Teamsters with Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). When evidence of classwide discrimination is present, even in an individual case, the Teamsters model is the more relevant one.

suspend the obligation to prove business necessity. But this is simply another rendition of their contention that articulation of a business related purpose should provide a defense. Here, the claim regarding costs is wholly speculative and unsupported. On this basis alone it should fail.

Moreover, Congress has rejected the notion of a cost-based defense. In 1978, opponents of the Pregnancy Discrimination Act complained that compliance would be too costly. Representative Hawkins, sponsor of the amendment, replied:

Eradicating invidious discrimination by definition costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or title VII, and it should not prevent this Congress from making clear that title VII prohibits this form of sex discrimination as well.

Legislative History of the Pregnancy Discrimination Act (1979) (committee print prepared for the Senate Committee on Labor and Human Resources) at 26. The Senate Report concluded:

even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country.

Id. at 48.

This Court has explicitly rejected a cost-based defense on three separate occasions. Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702, Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), and Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983).<sup>35/</sup> Even the Griggs Court must have

---

<sup>35/</sup> See also Robinson v. Lorillard, 444 F.2d at 799-800 and n.8; Hayes v. Shelby Mem. Hosp., 726 F.2d 1543, 1552 n.15 (11th Cir. 1984); Smallwood v.

recognized that validation and the alteration of unlawful practices would entail some costs, but mandated them anyway, and has repeatedly done so.

### III. PRINCIPLES OF STARE DECISIS PRECLUDE ABANDONING OR ALTERING THE BUSINESS NECESSITY DEFENSE.

The decisions noted above constitute an integral part of Title VII jurisprudence and are central to the disparate impact theory. Principles of stare decisis dictate adherence to Griggs, Albemarle, and other authoritative interpretations of Title VII. The Court has held that stare decisis "weighs heavily" and precludes a departure from precedent where Congress had the opportunity to reject the "Court's interpretation of its legislation" but

---

United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982) Gathercole v. Global Assocs., 545 F. Supp. 1280, 1282 (N.D. Cal. 1982).

declined to do so. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). Accord NLRB v. International Longshoremen Association, AFL-CIO, 473 U.S. 61, 84 (1985). In deciding whether to overrule an earlier case, the Court is required to determine whether that act "would be inconsistent with more recent expressions of Congressional intent." Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982); Monell v. New York City Department of Social Services, 436 U.S. 658, 695 (1978). See also Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 612 (1983) (O'Connor, concurring) (constrained to follow Court's prior interpretation of Title VI). Here, overruling Griggs, or any of its essential elements, particularly the business necessity requirement, would plainly be

"inconsistent" with "expressions of Congressional intent."

Congress is, of course, free to reverse a statutory construction by this Court that is inconsistent with its intent, and it has done so on several occasions, notably when the Court has narrowed the scope of civil rights laws.<sup>36/</sup>

In some of these prior instances, arguably the intent of Congress had not been as clear as it is here. Congress could hardly have made plainer its intent to adopt the entire constellation of

---

<sup>36/</sup> E.g., General Electric v. Gilbert, 427 U.S. 125 (1976) led to the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (1982). Grove City College v. Bell, 456 U.S. 555 (1984) was overruled by the Civil Rights Restoration Act, Pub. L. 100-259 (1988). Mobile v. Bolden, 446 U.S. 55 (1980), was reversed by the Voting Rights Act Amendments of 1982, 42 U.S.C. §1973, et seq. (1982). In Mobile v. Bolden a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose.



holdings for which Griggs stands. Under these circumstances, adherence to stare decisis will not only preserve the integrity of the judicial process, by reinforcing judicial reliability and predictability, it will also ensure that Congressional action endorsing Griggs will be respected.

#### CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Ninth Circuit in favor of respondents should be affirmed.

Respectfully submitted,

JOAN E. BERTIN  
Counsel of Record  
KARY L. MOSS  
ISABELLE KATZ PINZLER  
JOHN A. POWELL  
American Civil Liberties  
Union Foundation  
132 West 43rd Street  
New York, New York 10036  
(212) 944-9800

November 5, 1988

**APPENDIX**

APPENDIX

Statement of Interest of Amici Curiae

The American Civil Liberties Union ("ACLU") is a nationwide union, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the



corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long standing discrimination against women and minorities.

The NOW Legal Defense and education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women

economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

—v.—

FRANK ATONIO, *et al.*,

*Respondents.*

**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE**

GROVER G. HANKINS\*

*General Counsel*

SAMUEL M. WALTERS

*Assistant General Counsel*

NATIONAL ASSOCIATION FOR THE

ADVANCEMENT OF COLORED PEOPLE

4805 Mt. Hope Drive

Baltimore, Maryland 21215

(301) 486-9191

and

ALFRED W. BLUMROSEN

15 Washington Street

Newark, New Jersey 07102

(201) 648-5332

*Counsel for Amicus Curiae*

\*Counsel of Record

November 4, 1988

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	4
I. Title VII unqualifiedly prohibits segregation of employees or applicants which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status because of race .....	4
II. The facts found by the District Court establish segregation of workers by race by the employer .....	5
III. The combination of segregated recruiting and hiring channels, segregated job assignments, and refusal to consider minorities for promotion or transfer to white jobs establish a violation of Title VII .....	6
IV. The so-called "over representation" of minorities in lower paying jobs, plus their exclusion from higher paying white jobs, does constitute illegal segregation under Title VII .....	8
V. There can be no "business necessity" justification for maintaining job segregation.....	11



	PAGE
VI. This Court should affirm the holding of the Court of Appeals on the ground that illegal segregation has been established rather than dismiss the writ as improvidently granted .....	15
CONCLUSION .....	16

## TABLE OF AUTHORITIES

Cases:	PAGE
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1974).....	4, 10, 13
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	11
<i>Corning Glass Works v. Brennan</i> , 417 U.S. 189 (1974) .	12
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	13
<i>Ford Motor Co. v. EEOC</i> , 458 U.S. 219 (1982) .....	10
<i>Furnco Construction Co. v. Waters</i> , 438 U.S. 567 (1978) .....	11, 13
<i>Griggs v. Duke Power Co.</i> , 420 F.2d 1225 (4th Cir. 1970), reversed in part, 401 U.S. 424 (1971).....	7
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971).....	4, 7, 10
<i>Johnson v. Santa Clara County Transportation Agency</i> , 107 S. Ct. 1442 (1987).....	10
<i>Local 189, United Papermakers v. United States</i> , 416 F.2d 980 (5th Cir. 1969) .....	9
<i>Los Angeles Water and Power Co. v. Manhart</i> , 435 U.S. 702 (1978) .....	11
<i>McDonnell Douglas v. Green</i> , 411 U.S. 732 (1973) ..	7, 12, 14
<i>Miller v. International Paper Co.</i> , 408 F.2d 283 (5th Cir. 1969).....	9
<i>Phillips v. Martin-Marietta Corp.</i> , 400 U.S. 542 (1971)	11
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	8

	PAGE
<i>Teamsters v. United States</i> , 431 U.S. 333 (1977) . . .	4, 7, 11, 12
<i>United States v. Bethlehem Steel Corp.</i> , 446 F.2d 652 (2d Cir. 1971) . . . . .	9, 13
<i>United States Postal Service v. Aikens</i> , 460 U.S. 711 (1983) . . . . .	8, 14
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979) . . . .	10
<i>Watson v. Fort Worth Bank and Trust</i> , 487 U.S. ____ , 108 S. Ct. 2777 (1988) . . . . .	10
<b>Statutes:</b>	
42 U.S.C. Sec. 2000e, <i>et seq.</i> , Civil Rights Act of 1964 . .	4
<b>Regulations:</b>	
43 Fed. Reg. 19,260, 19,269 (May 4, 1978) . . . . .	3
Uniform Guidelines on Employee Selection Procedures—1978, 29 C.F.R. Sec. 1607.4(C)(1) . . . . .	11
<b>Other Authorities:</b>	
Blumrosen, <i>The Legacy of Griggs: Social Progress and Subjective Judgments</i> , 63 Chi. Kent L. Rev. 1 (1986) . . . .	16
Blumrosen, <i>Seniority and Equal Employment Opportunity: A Glimmer of Hope</i> , 23 Rutgers L. Rev. 268 (1969) . . . . .	4, 9
Blumrosen, <i>Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination</i> , 71 Mich. L. Rev. 59 (1972) . . . . .	12

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

No. 87-1387

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

—v.—

FRANK ATONIO, *et al.*,

*Respondents.*

---

**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE**

**INTEREST OF AMICUS CURIAE**

Amicus curiae National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality and social and economic justice in this country. To promote these ends, the NAACP and its members engage in activity protected by the United States Constitution, including petitioning the government for the redress of grievances. The NAACP and its members throughout the United States for more than twenty years have assisted workers in utilizing Title VII of the Civil Rights Act of 1964 to challenge employment discrimination against minorities and women. The NAACP has urged the Congress to strengthen Title VII and other provisions of the Civil Rights Act of 1964.

Open and notorious segregation of Black workers into inferior jobs was one of the hallmarks of the system of segregation and discrimination in the South before the Civil Rights Act was adopted. Because of the litigation under Title VII, many of the overt forms of discrimination, such as hiring from dual segregated labor markets, discrimination in job assignments, and discriminatory refusals to allow Blacks into better paying jobs, have been abandoned. However, there still remain circumstances in which minorities are restricted today, in precisely the same manner as in earlier years.

For the reasons explained below, the opinions of the District Court and Court of Appeals, for differing reasons, may permit the continued existence of blatant job segregation. The NAACP urges this Court to correct the errors of both the District Court and the Court of Appeals, and to reaffirm that the evil of job segregation remains unlawful under Title VII.

This amicus curiae brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

### SUMMARY OF ARGUMENT

Certiorari was granted to consider three questions relating to the concept of discrimination under Title VII of the Civil Rights Act of 1964 that deals with neutral practices which have a "disparate impact" on minorities or women.<sup>1</sup> This case does not

1 The questions presented are:

1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not under-represented in the at-issue jobs?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly shift the burden of proof to petitioners?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of non-rationally motivated employment practices under the disparate impact model?

involve such practices. It involves racial segregation in hiring, job assignments, and promotions against Filipino and Alaskan Native workers in favor of whites.<sup>2</sup> The employers hired minority workers through separate procedures and channels from those used to hire whites. They assigned minority workers to lower paying jobs and refused to consider them for promotion or transfer to white jobs. Whites were hired through separate procedures and channels from those used to hire minorities into higher paying jobs and were separately housed and fed from minorities. These facts, established by the District Court, constitute racial segregation in violation of the statute.

The courts below did not recognize the job segregation of minorities as a violation of Title VII. The District Court discounted evidence of segregation of minorities in low paying jobs as "over-representation" of minorities. It then analyzed several employment practices separately but never examined the interaction between segregated hiring, job assignment, and the refusal to consider minorities for promotion or transfer. The Court of Appeals analyzed employment procedures under the disparate impact principle and reversed the District Court. In applying the impact principle, it recognized a "business necessity" defense to the maintenance of job segregation. This is not the law. Job segregation is illegal.

This court granted Certiorari to consider questions relating to the application of impact theory. However, the facts—segregation in hiring, job assignments, and refusal to transfer or promote minorities—make this case an inappropriate vehicle to resolve questions concerning disparate impact theory. The District Court analysis was clearly erroneous, and the Court of Appeals committed error in allowing a "business necessity" defense to segregation.

Since the Court of Appeals found for the employees, albeit on an erroneous theory, its judgment should be affirmed. This

2 Both Alaskan Natives and persons of Filipino descent are considered as being in separate racial groups from whites for the purposes of the Federal reporting policies. See 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).



Court should remand, making clear that the segregation which has been established in this case is illegal and cannot be defended on grounds of business necessity.

## THE ARGUMENT

### I. TITLE VII UNQUALIFIEDLY PROHIBITS SEGREGATION OF EMPLOYEES OR APPLICANTS WHICH DEPRIVE OR TEND TO DEPRIVE ANY INDIVIDUAL OF EMPLOYMENT OPPORTUNITIES OR OTHERWISE ADVERSELY AFFECT HIS STATUS BECAUSE OF RACE

The language of Sec. 703(a)(2), makes it an unlawful employment practice for an employer to:

"... limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . ."

Overt and current job segregation on the basis of race has never been defended before this Court. In the earliest cases under Title VII, employers admitted pre-act segregation against blacks, but stated that segregation had ended, and the post-act situation was justified by seniority or testing practices.<sup>3</sup> None of the cases previously before this Court involved an employer who hired minorities through recruiting practices separate from those used to hire whites, assigned them to lower paying jobs and then, as a matter of general policy, refused to consider them for promotion or transfer to the better "white" jobs. The refusal to consider minorities for promotion out of segregated jobs is illegal *per se* as maintaining segregation.

<sup>3</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1974); *Teamsters v. United States*, 431 U.S. 333 (1977); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 Rutgers L. Rev. 268 (1969).

### II. THE FACTS FOUND BY THE DISTRICT COURT ESTABLISH SEGREGATION OF WORKERS BY RACE BY THE EMPLOYER

The facts found by the District Court establish that the defendants did segregate employees and applicants in ways which deprived them of employment opportunities because of their race.<sup>4</sup> The District Court found:

(1) Employees were segregated by race, with whites holding better, higher paying jobs and Alaskan Natives and Filipinos holding lower paying laborer and cannery jobs.<sup>5</sup>

(2) Filipinos and Alaskan Natives have been recruited from Alaskan Native communities and a local union in Seattle composed mainly of workers of Filipino extraction.<sup>6</sup>

(3) They have been assigned to do low paid labor and cannery work.<sup>7</sup>

(4) The jobs done by these workers are characterized as "Filipino jobs," or "Eskimo jobs," or "native" jobs.<sup>8</sup>

<sup>4</sup> References throughout are to the opinions appearing in appendices to the Joint Appendix. For convenience, the reference to Joint Appendix is omitted when referring to the opinions of the Courts below. Appendix I contains the opinion of the District Court, which also appears in 34 EPD ¶ 34,437. Appendix III contains the Court of Appeals' first opinion of Aug. 16, 1985, also appearing in 768 F.2d 1120 (9th Cir. 1985). Appendix V contains the *en banc* opinion of the Court of Appeals of Feb. 23, 1987, appearing in 810 F.2d 1477 (9th Cir. 1987). Appendix VI contains the decision of the panel of the Court of Appeals on remand from the Court *en banc*, of Sept. 2, 1987, appearing in 827 F.2d 439 (9th Cir. 1987) as to which certiorari has been granted.

<sup>5</sup> District Court findings #105 (I-36), #109 (I-38). See also *Atonio* (VI-18) 827 F.2d 439 at 444, ("The statistics show only racial stratification by job category.") See also, *Atonio* (III-9) 768 F.2d 1120, 1124.

<sup>6</sup> The District Court findings #90 (I-32), #105 (I-36), #109 (I-38); *Atonio* (V-6-7) 810 F.2d at 1479.

<sup>7</sup> *Id.*

<sup>8</sup> District Court finding #135-141 (I-76-80); *Atonio* (VI-33) 827 F.2d at 447.

(5) The employer does not consider members of the plaintiff class for employment, promotion, or transfer to the higher paying jobs held by whites, regardless of their possible qualifications.<sup>9</sup>

(6) Whites have been recruited primarily from the lower 48 states for the higher paying jobs.<sup>10</sup>

(7) The whites had superior residential and eating facilities.<sup>11</sup>

(8) The pay of white workers, both unskilled and skilled, was higher than that of Alaskan Native and Filipino workers.<sup>12</sup>

(9) When Filipino and Alaskan Native workers sought to apply for the white jobs, they were brushed off with a variety of excuses relating to the timeliness of their applications.<sup>13</sup>

### III. THE COMBINATION OF SEGREGATED RECRUITING AND HIRING CHANNELS, SEGREGATED JOB ASSIGNMENTS, AND REFUSAL TO CONSIDER MINORITIES FOR PROMOTION OR TRANSFER TO WHITE JOBS ESTABLISH A VIOLATION OF TITLE VII

The employers devised segregated labor markets. For the higher paying jobs, they recruited whites from the lower 48. For the low paying jobs, they recruited minorities from the local villages or the Filipino union. They assigned minorities to the

9 District Court finding #86 (I-30), #89 (I-31), #110 (I-39). White jobs are filled from Seattle and Astoria. District Court findings #86 (I-30), #112 (I-39). The employers do not promote from within. District Court Finding #112 (I-39). "Defendant's cannery workers and laborers do not form a labor pool for other jobs at defendant's facilities." District Court finding #110 (I-39). See also Question Presented #1 on which certiorari was granted, note 1, *supra*.

10 District Court finding #86 (I-30).

11 District Court findings #148, 149 (I-81-84).

12 *Atonio* (III-91) 768 F.2d at 1124.

13 District Court findings #150-172 (I-84-94).

lower paying cannery and labor jobs, and whites to the higher paying jobs. They did not permit minority employees promotion or transfer to better jobs.<sup>14</sup> Thus the employers segregated the plaintiff class through its hiring practices, and maintained that segregation through job assignment practices and through refusal to consider minorities for promotion and transfer. These facts were all found by the District Court. This blanket refusal to consider minorities for better jobs locked them into the lower paying jobs for which they had been hired.<sup>15</sup>

This obvious violation of Title VII was obscured because of the efforts of the courts below to fit this case of brutal segregation into the framework of disparate impact or disparate treatment.<sup>16</sup> The concept of disparate impact was intended to address facially neutral practices.<sup>17</sup> The concept of disparate treatment was intended to order the proofs in an individual case of discrimination.<sup>18</sup> But these categories were never intended to be exclusive.<sup>19</sup> They were not developed in, nor have they been applied to, cases of current work force segregation.

The emphasis on the proof process can obscure the ultimate issues of discrimination. In *United States Postal Service v.*

14 The concentration of minorities in the lower paying jobs and the denial of any consideration for promotion or transfer establishes a violation of Title VII, even though some whites were also in the lower paying jobs. *Teamsters v. United States*, 431 U.S. 333 at 337-338 (1977). See also, *Griggs v. Duke Power Co.*, 420 F.2d 1225 at 1247 (4th Cir. 1970), *reversed in part*, 401 U.S. 424 (1971), Sobeloff, J., *dissenting*.

15 *Teamsters v. United States*, 431 U.S. 345, 349-350 (1977) deals with a case of pre-act segregation perpetuated by post-act operation of a seniority system. In this case, post-act segregation is perpetuated by a refusal to consider those segregated for promotion or transfer to white jobs.

16 District Court (I-96-107). Court of Appeals: *Atonio* (III-15, 43-47) 768 F.2d 1125, 1131; (V-9-12) 810 F.2d 1480; (VI-4-9) 827 F.2d at 442.

17 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

18 *McDonnell Douglas v. Green*, 411 U.S. 732 (1973).

19 *Teamsters v. United States*, 431 U.S. 338 at 358 (1977).



*Aikens*,<sup>20</sup> this Court criticized the district court for addressing the existence of a prima facie case when all the evidence was in, rather than dealing with the question of discrimination *vel non*. In *Texas Department of Community Affairs v. Burdine*,<sup>21</sup> this Court noted how the lower court's procedural rulings harbored a substantive error. The same errors were committed here.

#### IV. THE SO-CALLED "OVER-REPRESENTATION" OF MINORITIES IN LOWER PAYING JOBS, PLUS THEIR EXCLUSION FROM HIGHER PAYING WHITE JOBS, DOES CONSTITUTE ILLEGAL SEGREGATION UNDER TITLE VII

The District Court addressed skills requirements for the "white jobs" as matters of disparate treatment requiring proof of intent.<sup>22</sup> On that issue, it examined the statistics showing the disparity between the large number of minorities in the lower paying jobs and their absence in the "white" jobs. It discounted this evidence, calling it "over-representation" because minorities were only a tiny fraction of the total population of Alaska, Washington and Oregon.<sup>23</sup> The District Court then viewed individual instances of rebuffed applicants, word of mouth recruiting among whites, racial labels, segregated housing and eating facilities as either justified or insignificant. It noted that "this is not a promotion from within case,"<sup>24</sup> but did not find that all minorities were unqualified for the "white jobs."<sup>25</sup>

20 460 U.S. 711, 715-717 (1983).

21 450 U.S. 248, 258-259 (1981).

22 The District Court treated skills requirements as subjective and therefore not subject to the disparate impact rule. District Court (I-102).

23 District Court findings #103 (I-35), #105 (I-36), #107 (I-37), #109 (I-38-39), #121 (I-42).

24 District Court (I-114).

25 Any such finding would have been inconsistent with the District Court's conclusion that some of the "at issue" jobs were unskilled. District Court finding #134 (I-75).

The Court of Appeals in reviewing the District Court stated:

Thus, when considering the skilled positions, the [district] court found that statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race.<sup>26</sup>

To summarize, the District Court identified the "over-representation" of minorities in the lower paying jobs. This "over-representation" was then relied upon to deemphasize the comparison of the number of minorities in lower paying jobs with whites in higher paying jobs. This "over-representation" is a euphemism for segregation. Treating segregation as "over-representation" obscured segregation as a violation.<sup>27</sup>

The argument that because plaintiffs are segregated they are entitled to no relief because they are over-represented is disingenuous. In early Title VII cases, employers did not argue they were entitled to keep Blacks in lower paying jobs because they had so many of them.<sup>28</sup> Where the employer uses segregated recruiting processes to hire minorities or women into lower paying jobs and then refuses as a matter of policy to consider them for promotion or transfer, nothing more is needed to establish a violation of Title VII.<sup>29</sup> This case is not analogous to *Watson v.*

26 *Atonio* (VI-16) 827 F.2d at 444.

27 District Court finding #121 (I-42) treated "over-representation" as a reason not to credit statistics comparing proportions of minorities in lower paying jobs with whites in higher paying jobs.

28 *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). In the early years under Title VII, the EEOC frequently obtained promises of "promotion from within" to end job segregation. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 Rutgers L. Rev. 268, 273-274, 303 (1969).

29 "And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all." Gwin, J. in *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969). The sentiment is applicable to Alaska.



*Fort Worth Bank and Trust*,<sup>30</sup> where four justices were concerned with the risk of finding discrimination when it did not exist. Rather it is its opposite—a failure to see discrimination when it is blatant.

The Court of Appeals compounded the error of the District Court in the statement quoted above. It assumed that proof of segregation in hiring and assignment along with the refusal to allow promotion and transfer was not enough to show a violation of the statute, but that, in addition, intentional discrimination had to be shown.<sup>31</sup> This double burden, a requirement of showing *both* segregation *and* discrimination, is not warranted. The statute makes segregation itself illegal.

The statute is intended to assist those who have been segregated to break out of their situations, not to permit the fact of segregation to justify restrictions against them. The segregation into low paying jobs does not constitute favored treatment as the term “over-representation” suggests; rather, it constitutes the continued exploitation of minority workers trapped into low paying jobs. This Court has repeatedly said that the objective of the statute is to open opportunities to those who have traditionally been denied them.<sup>32</sup> In this case, the group interest of minorities in freedom from job segregation is identical to the interest of each individual minority group member.

30 487 U.S. —, 108 S. Ct. 2777 (1988).

31 “. . . statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that *the segregation is attributable to intentional discrimination against any particular race.*” [emphasis added] *Atonio* (VI-16) 827 F.2d at 444.

32 *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, 429-432 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975); *United Steelworkers v. Weber*, 443 U.S. 193, 202-203 (1979); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Johnson v. Santa Clara County Transportation Agency*, 107 S. Ct. 1442 (1987).

The Uniform Guidelines on Employee Selection Procedure, while supporting the “bottom line” concept with respect to employers who employ at the availability level, expressly states that this concept is inapplicable to those employees who have been subject of prior restrictions on promotional opportunity. Uniform Guidelines on Employee

This Court has frequently noted that the statute proscribes discrimination against individuals.<sup>33</sup> In *Connecticut v. Teal*,<sup>34</sup> the court stated that the employer could not “cancel out” discrimination against some minorities by promoting others. Similarly in *Furnco*<sup>35</sup> and *Teamsters*,<sup>36</sup> this Court held that the hiring or promotion of some minorities does not permit an employer to discriminate against others. In this case, each individual minority worker is a victim of the unlawful segregation of minorities. This deprivation of individual rights cannot be justified by a claim that the concentration of minorities in segregated jobs constitutes “over-representation.”

#### V. THERE CAN BE NO “BUSINESS NECESSITY” JUSTIFICATION FOR MAINTAINING JOB SEGREGATION

The Court of Appeals reviewed the District Court’s analysis of the facts from the perspective of the disparate impact principle, with its corollary defense of business necessity. The Court of Appeals said:

. . . While the district court discounted the comparative statistics in evaluating the claims of intentional discrimination in skilled jobs we find them sufficiently probative of adverse impact. The statistics show only racial stratification by job category. This is sufficient to raise an inference

Selection Procedures-1978, 29 C.F.R. Sec. 1607.4(C)(1) provides that the “bottom line” is not a justification “where the selection procedure is a significant factor in the continuation of patterns of assignment of incumbent employees caused by prior discriminatory employment practices.”

33 *Connecticut v. Teal*, 457 U.S. 440 (1982); *Los Angeles Water and Power Co. v. Manhart*, 435 U.S. 702 (1978). *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 543-544 (1971) held that an employer could not justify exclusion of women with young children on the grounds that it hired many other women.

34 457 U.S. at 452-456 (1982).

35 *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 at 579 (1978).

36 *Teamsters v. United States*, 431 U.S. 324, 341-342 (1977).

that some practice or combination of practices has caused the distribution of employees by race and *to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs.* [emphasis added]<sup>37</sup>

This analysis contained an error of law in assuming, without discussion, that the defense of business necessity was available in a case where the employer knowingly creates and maintains job segregation and does not consider minority workers for advancement into white jobs. The statute does not permit the defense of "business necessity" in this type of case.

The "business necessity" defense was developed by this Court as a component of the concept that practices with disparate impact on minorities are illegal.<sup>38</sup> But it has no relevance to cases of overt discrimination. Any economic advantage which the employer may derive from such segregation is simply illegal.<sup>39</sup> The "legitimate business reason" test was developed in *McDonnell Douglas* as a method of ordering proof where the issue of the employer's motive is clearly drawn between two possibilities, one legal and one illegal. Neither test is required to be applied to practices which segregate minorities in hiring, assignment, promotion, and transfer.<sup>40</sup> Here, it is clear that the employer regularly and normally treated minorities less favorably than whites.

The recruitment and hiring practices of the employer produced a segregated work force. The no-promotion policy maintained that segregation. There is no justification for this refusal to consider incumbent minority employees for promotion or

37 *Atonio* (VI-18) 827 F.2d at 444.

38 See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 81-84 (1972).

39 Compare *Corning Glass Works v. Brennan*, 417 U.S. 189, 205 (1974).

40 The closest this Court has come to addressing a situation such as this is *Teamsters v. United States*, 431 U.S. 349 (1977).

transfer to "white" jobs for which they may be qualified.<sup>41</sup> The statute does not provide a Bona Fide Occupational Qualification (BFOQ) defense for racial discrimination.<sup>42</sup> The business necessity claim in a race case must be construed in a most limited way, so as not to defeat the purpose of the statute.<sup>43</sup> Even where the statute does provide for a BFOQ defense, this Court has been careful to limit the scope of that defense to preserve the thrust of the prohibition on discrimination.<sup>44</sup> While an employer may demonstrate that it could not recruit an integrated labor force for a specific job because of availability, it cannot simultaneously refuse to consider the people it hires into a segregated job for other opportunities without violating Title VII.<sup>45</sup>

These facts as a matter of law constitute the maintenance of a segregated work force which denied minorities opportunities for advancement. Intentional segregation is established by

41 These practices were not found to constitute a bona fide seniority system. Compare District Court finding #101 (I-35).

42 See Sec. 703(e)(1). The District Court appeared to apply a loose form of a BFOQ defense by its suggestions that many members of the class do not speak English, and prefer to fish rather than work in the summer time. District Court Finding #100 (I-34). The "business necessity" defense of *Griggs* has not been applied to cases of overt discrimination by this Court. In fact, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) suggests that claims of business necessity would not justify overt discrimination.

43 *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

44 *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

45 In *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978), the employer justified its policy of not hiring at the gate on the grounds that it needed some information about the applicants' capabilities before hiring them. This argument cannot justify a blanket refusal to consider incumbent employees for promotion where these employees are well known to the employer. *Furnco's* caution against courts restructuring an employer's recruitment and hiring practices has no application to a case where segregation exists. In *Furnco*, the employer's statistics suggested a lack of discriminatory intent. Here, the promotion and transfer policies themselves constitute illegal maintenance of segregation.



proof of the fact of segregation by race in the hiring process and job assignments, along with its knowing maintenance by refusing to permit promotions and transfers.<sup>46</sup> All of the opinions below assumed that the facts in this case had to be fitted into the mold of either disparate treatment or disparate impact. As a consequence they treated separately these facts concerning segregation in hiring, assignment, and refusal to permit promotion or transfer, which, taken together, establish segregation in violation of Title VII.<sup>47</sup>

As it did in *Aikens*, this Court should make clear that the lower courts must decide ultimate issues of segregation or discrimination *vel non* when all the evidence is before them. When faced with blatant segregation, the lower courts need not fit the case into categories of disparate impact or disparate treatment. There can be no valid reason for the conscious maintenance of a racially segregated work force which flowed from the refusal to allow transfer and promotion to white jobs.

46 The decision to conduct all hiring in the lower 48 for white jobs, and not to consider applications from incumbent minority employees during the time they are employed, obviously makes it easier for whites than minorities to make applications.

47 The District Court did not properly apply that aspect of *McDonnell Douglas v. Green* which deals with statistics. *McDonnell Douglas* states that "[o]ther evidence which may be relevant to any showing of pretext includes facts as to . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. (411 U.S. at 804-805). In the accompanying footnote, the Court stated that, "[t]he District court may, for example, determine after reasonable discovery that, 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.'" *Id.* at 805 (citation omitted). Contrary to these suggestions, the District Court found that such evidence established "over-representation," not discrimination. This was an error of law.

# **VI. THE COURT SHOULD AFFIRM THE HOLDING OF THE COURT OF APPEALS ON THE GROUND THAT ILLEGAL SEGREGATION HAS BEEN ESTABLISHED RATHER THAN DISMISS THE WRIT AS IMPROVIDENTLY GRANTED**

This court granted Certiorari to consider questions which relate to disparate impact theory. But the application of that theory to the facts of this case would permit a business necessity defense to a case of overt segregation.<sup>48</sup> This is the substantive error embedded in the application of the disparate impact analysis to a case of job segregation. Thus, the Court of Appeals reasoning is in error.

While this Court could dismiss the writ as improvidently granted, to do so would leave uncorrected the error of the Court of Appeals in permitting a business necessity defense to job segregation. The error of the Court of Appeals should be corrected lest it generate other efforts to evade Title VII. At the same time, the Court of Appeals correctly overturned the District Court's analysis that "over-representation" of minorities detracted from the proof of discrimination. In this, the holding of the Court of Appeals should be affirmed. Therefore, the NAACP urges the Court to correct both the plain error of the District Court in its failure to appreciate the significance of the facts concerning job segregation, and the error of law of the Court of Appeals in recognizing a business necessity defense to maintenance of job segregation. This can be accomplished by affirming the Court of Appeals' holding and remanding with instructions that the evidence of segregated hiring, job assignments, and refusals to consider minorities for promotion and transfer constitute a violation of the statutory prohibition on segregation.

48 The statement of Question Presented #1, note 1, *supra*, assumes the legitimacy of the "no promotion" rule which is illegal under the facts of this case.



## CONCLUSION

A generation after Title VII of the Civil Rights Act was adopted, changed circumstances, some resulting from its implementation, have created new problems of interpretation. The improvement in minority and female employment under the statute, as interpreted by this Court, has moved the issues from those crude forms of discrimination of the 1960's to more subtle limitations on minority and female employment.<sup>49</sup> But this case is not the proper vehicle to examine these subtle questions. It is a case of crude, currently maintained, segregation. To treat this case otherwise will permit an overt discriminator to rely on defenses tailored to more refined cases, and, thus, permit continued racial segregation. Pockets of continued segregation remain, as this case illustrates. Congress directly prohibited segregated employment practices such as those found to exist in this case by the District Court. The plaintiffs are entitled to the full protection of the Civil Rights Act of 1964.

Respectfully submitted,

GROVER G. HANKINS\*  
*General Counsel*

SAMUEL M. WALTERS  
*Assistant General Counsel*  
NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE  
Special Contribution Fund, and

ALFRED W. BLUMROSEN

\**Counsel of Record*

---

<sup>49</sup> Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 Chi. Kent L. Rev. 1 (1986).

12  
No. 87-1387

Supreme Court, U.S.  
**FILED**  
NOV 4 1988  
JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ANTONIO, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**BRIEF FOR THE LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW AS  
AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS**

CONRAD HARPER  
STUART J. LAND  
Co-Chairmen  
NORMAN REDLICH  
Trustee  
RICHARD T. SEYMOUR  
JAMES C. GRAY, JR.  
LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW  
1400 "Eye" Street, N.W.  
Suite 400  
Washington, D.C. 20005  
(202) 371-1212

NICHOLAS DEB. KATZENBACH\*  
ALAN E. KRAUS  
DAVID ARCISZEWSKI

RIKER, DANZIG, SCHERER, HYLAND  
& PERRETTI  
Headquarters Plaza  
One Speedwell Avenue  
Morristown, New Jersey 07960-1981  
(201) 538-0800

*Attorneys for Amicus Curiae  
Lawyers' Committee for Civil Rights  
Under Law*

November 4, 1988

\*Counsel of Record

37PP

## TABLE OF CONTENTS

	<u>PAGE</u>
INTEREST OF AMICUS CURIAE .....	1
QUESTIONS PRESENTED .....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	6
I. IN A DISPARATE IMPACT CASE, AS THE NINTH CIRCUIT PROPERLY HELD, ONCE THE PLAINTIFF HAS MADE A PRIMA FACIE SHOWING, THE BURDEN OF PER- SUASION SHIFTS TO THE EMPLOYER TO REBUT THAT PRIMA FACIE SHOWING ...	6
A. The Differences between Individual Disparate Treatment Cases and Classwide Disparate Impact Cases Warrant a Different Allocation of the Burdens of Proof .....	7
B. This Court Has Uniformly Held that the Bur- den of Proving Business Necessity Shifts to the Employer Following a Prima Facie Show- ing in a Disparate Impact Case .....	13
C. Sound Reasons of Public Policy and Practical- ity Warrant the Shifting of the Burden of Per- suasion to the Employer in Disparate Impact Cases .....	15
II. SPECIFIC CAUSATION IS NOT THE APPROPRIATE STANDARD IN A DISPA- RATE IMPACT CASE .....	17
III. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS' STATISTICS MADE OUT A PRIMA FACIE CASE OF DISPARATE IMPACT .....	25
CONCLUSION .....	29



## TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>Albermarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	<i>passim</i>
<i>Antonio v. Wards Cove Packing Co.</i> , 827 F.2d 439 (9th Cir. 1987) .....	6
<i>Barnett v. W. T. Grant Co.</i> , 518 F.2d 543 (4th Cir. 1975) .....	19
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986) .....	20
<i>Belcher v. Bassett Furniture Industries Inc.</i> , 588 F.2d 904 (4th Cir. 1978) .....	15
<i>Bonilla v. Oakland Scavenger Co.</i> , 697 F.2d 1297 (9th Cir. 1982), <i>cert. denied</i> , 467 U.S. 1251 (1984) .....	18
<i>Brown v. Gaston County Dyeing Machine Co.</i> , 457 F.2d 1377 (4th Cir.), <i>cert. denied</i> , 409 U.S. 982 (1972) .....	19
<i>Burns v. Thiokol Chemical Corp.</i> , 483 F.2d 300 (5th Cir. 1973) .....	26
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982) .....	<i>passim</i>
<i>Davis v. City of Dallas</i> , 483 F. Supp. 54 (N.D. Tex 1979) .....	27
<i>Domingo v. New England Fish Co.</i> , 445 F. Supp. 421 (W.D. Wash. 1977), <i>aff'd</i> , 727 F.2d 1429 <i>modified</i> , 742 F.2d 520 (9th Cir. 1984) .....	19
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977) .....	11,12,14
<i>EEOC v. Inland Marine Industries</i> , 729 F.2d 1229 (9th Cir.), <i>cert. denied</i> , 469 U.S. 855 (1984) .....	18

## TABLE OF AUTHORITIES—Continued

	<u>PAGE</u>
<i>Falcon v. General Telephone Co. of the Southwest</i> , 626 F.2d 369 (5th Cir. 1980), <i>vacated</i> , 450 U.S. 1036, <i>aff'd on rehearing</i> , 647 F.2d 633 (5th Cir. 1981) .....	27
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) .....	6,28
<i>Furnco Construction Co. v. Waters</i> , 438 U.S. 567 (1978) .....	9,11,15
<i>Gibson v. Local 40</i> , 543 F.2d 1259 (9th Cir. 1976) ...	18
<i>Green v. USX Corp.</i> , 843 F.2d 1511 (3d Cir. 1988), <i>petition for cert. filed</i> , 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141) .....	22,24
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) ....	<i>passim</i>
<i>Hazelwood School District v. United States</i> , 433 U.S. 299 (1977) .....	2,27
<i>International Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	<i>passim</i>
<i>Lewis v. Bloomsburg Mills, Inc.</i> , 773 F.2d 561 (4th Cir. 1985) .....	1
<i>Lilly v. Harris-Teater Supermarket</i> , 842 F.2d 1496 (4th Cir. 1988) .....	19
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979) .....	25
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	9,11
<i>Payne v. Travenol Laboratories, Inc.</i> , 673 F.2d 798 (5th Cir.), <i>cert. denied</i> , 459 U.S. 1038 (1982) ....	2,8

## TABLE OF AUTHORITIES—Continued

	<u>PAGE</u>
<i>Pouncy v. Prudential Insurance Co.</i> , 668 F.2d 795 (5th Cir. 1982) .....	17
<i>Rowe v. General Motors Corp.</i> , 457 F.2d 348 (5th Cir. 1972) .....	18
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984), <i>cert. denied</i> , 471 U.S. 1115 (1985) .....	24
<i>Sledge v. J. P. Stevens &amp; Co.</i> , 585 F.2d 625 (4th Cir. 1978), <i>cert. denied</i> , 440 U.S. 981 (1979) .....	2
<i>Tarver v. City of Houston</i> , 22 EPD ¶130, 689 (S.D. Tex. 1980) .....	21
<i>Texas Department of Community Affairs v.</i> <i>Burdine</i> , 450 U.S. 248 (1981) .....	<i>passim</i>
<i>United States v. Georgia Power Co.</i> , 474 F.2d 906 (5th Cir. 1973) .....	19
<i>United States v. County of Fairfax</i> , 629 F.2d 932 (4th Cir. 1980) .....	8,16
<i>Vuyanich v. Republic National Bank</i> , 521 F.Supp. 656 (N.D. Tex. 1981), <i>rev'd on other grounds</i> , 723 F.2d 1195 (5th Cir.), <i>cert. denied</i> , 469 U.S. 1073 (1984) .....	8
<i>Watson v. Fort Worth Bank and Trust</i> , 487 U.S. 108 S.Ct. 2777 (1988) .....	<i>passim</i>
<i>Wilkins v. University of Houston</i> , 654 F.2d 388 (5th Cir. 1981), <i>vacated</i> , 459 U.S. 809 (1982), <i>aff'd on</i> <i>rehearing</i> , 695 F.2d 134 (5th Cir. 1983) .....	20
 STATUTES, REGULATIONS AND RULES	
Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §2000e-2 .....	22

## TABLE OF AUTHORITIES—Continued

	<u>PAGE</u>
Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. §1607 .....	16
29 C.F.R. §1607.16Q .....	23
29 C.F.R. §1615 .....	16
Fed. R. Civ. P. 8 .....	12
 CONGRESSIONAL HISTORY:	
S.Rep. No. 415, 92nd Congress, 1st Sess. 5 (1971) .	22
 MISCELLANEOUS:	
110 Daily Labor Rep. (BNA) A-3 (June 7, 1985)...	17
Friedman and Williams, <i>Current Use of Tests for</i> <i>Employment</i> , in 2 <i>Ability Testing: Uses, Conse-</i> <i>quences, and Controversies</i> (1982) .....	16
Report of the Director, Administrative Office of the U.S. Courts (1977) .....	29
Rose, <i>Subjective Employment Practices: Does the</i> <i>Discriminatory Impact Analysis Apply?</i> , 25 San Diego L. Rev. 63 (1988) .....	17
B. Schlei and P. Grossman, <i>Employment Discrimi-</i> <i>nation Law</i> (2d ed. 1983) .....	11,26

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

---

No. 87-1387

---

WARDS COVE PACKING COMPANY, INC.,  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ANTONIO, *et al.*,

*Respondents.*

---

**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

---

**BRIEF FOR THE LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW AS  
AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS**

---

**INTEREST OF AMICUS CURIAE**

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae* urging affirmance.<sup>1</sup>

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous persons in administrative proceedings and lawsuits under Title VII. *E.g.*, *Lewis v. Bloomsburg Mills, Inc.*,

---

<sup>1</sup> Pursuant to Rule 36.2, the Lawyers' Committee is filing herewith written consents of the parties to the submission of this brief as *amicus curiae*.



773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. , 108 S.Ct. 2777 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The questions presented by this case raise important and recurring issues in Title VII law. In particular, the allocation of the burdens of proof in disparate impact cases and the nature of plaintiffs' burden in presenting a *prima facie* case of disparate impact are issues that affect virtually every class action brought under Title VII. This Court's decision will undoubtedly have significant implications on present and future Title VII suits in which the Lawyers' Committee participates. In addition, the Lawyers' Committee has a longstanding interest in persuading the Court to adopt principles that will result in the sound administration of the discrimination laws, so that findings of liability will be obtainable by persons with legitimate claims and limited resources. In this case, the Lawyers' Committee also brings to the Court the benefit of its actual experience in marshalling the facts in complex employment discrimination class actions, and discusses in practical terms the flaws in the approach taken by petitioners and the United States as *amicus curiae* to disparate impact cases.

### QUESTIONS PRESENTED

1. Whether, in a disparate impact case under Title VII, plaintiffs' *prima facie* showing shifts a burden of persuasion to the employer to prove the business necessity of the personnel practices at issue or merely a burden of production?
2. Whether, in order to make a *prima facie* showing in a disparate impact case, plaintiffs are required to identify specific employment practices at issue and prove a specific causal link between each practice and an identifiable disparate impact?
3. Whether the statistical showing made by plaintiffs in this case, which demonstrated a significant racial disparity between

petitioners' cannery workers and non-cannery workers, was sufficient to make out a *prima facie* case?

### SUMMARY OF ARGUMENT

1. Petitioners contend that the Ninth Circuit Court of Appeals erred by placing the burden on them of disproving plaintiffs' statistical showing of disparate impact before, in petitioners' view, plaintiffs had even made out a *prima facie* case. (Pet. Brief at 37-47.) Petitioners have misconstrued the Ninth Circuit's holding: The Ninth Circuit held only that, if employers attempt to dispute plaintiffs' statistical showing with statistics of their own, those statistics must be probative and relevant. Here, petitioners' labor force statistics relied on job criteria and qualifications that were not shown to be actually used by petitioners. The Ninth Circuit properly held that those labor force statistics were not sufficiently probative to dispute plaintiffs' *prima facie* showing of disparate impact.

The United States as *amicus curiae* goes further than petitioners. The United States argues that, on this appeal, this Court should discard the order of proof in disparate impact cases that has been controlling since *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and, for the first time, expressly hold that the employer's burden in rebutting a *prima facie* showing of disparate impact is one of mere production, rather than persuasion. In short, the United States urges this Court to apply the individual disparate treatment order of proof, as set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to disparate impact cases.

The argument of the United States is, we submit, fatally flawed. It ignores the critical differences between individual disparate treatment cases and disparate impact cases that make *Burdine* inappropriate and inapplicable in the disparate impact context. In individual disparate treatment cases, where the employer's motivation is the ultimate issue, the plaintiff's *prima facie* case eliminates only the "most common" nondiscriminatory reasons for differences in treatment. It is not until the employer responds by articulating the "real" reason for its different treatment of plaintiff that the plaintiff ultimately

proves discrimination by eliminating the so-called real reason as well.

In disparate impact cases, in contrast, the plaintiffs face a much heavier *prima facie* burden. There, plaintiffs, in order to make a *prima facie* showing, must demonstrate that the employer's facially neutral practices have caused a significant disparate impact upon minorities. Because proof of discriminatory motive is not necessary in disparate impact cases, a *prima facie* showing, unless rebutted by the employer by proof of the business necessity of the practices at issue, mandates a holding in favor of plaintiffs. Obviously, employers have far better access to evidence concerning the business necessity of their employment practices. There is nothing unfair about asking them to carry the burden of proving that affirmative defense.

In sum, the far heavier *prima facie* burden imposed on disparate impact plaintiffs amply justifies a heavier rebuttal burden on defendant employers. This Court has uniformly applied that very order of proof in past disparate impact decisions and there is, we submit, no reason to alter that rule now.

2. Petitioners further contend that plaintiffs should not be allowed to challenge the cumulative disparate impact of petitioners' personnel system. Petitioners assert that disparate impact plaintiffs must be required to identify specific practices at issue and demonstrate in detail the specific disparate impact caused by each practice. Otherwise, petitioners contend, the employer faces the unfair burden of defending the business necessity of every aspect of his personnel system. That issue is not fairly presented on this appeal.

This is not a case where the plaintiffs launched a "shotgun" attack on an employer's entire personnel system. Here, as the Ninth Circuit found, plaintiffs proved the disparate impact of six specific employment practices. Those six practices—the use of subjective criteria, nepotism, separate hiring channels, word-of-mouth recruiting, race labelling and segregated facilities—are well-established causes of disparate impact. Thus, plaintiffs amply carried their *prima facie* burden of proving that the practices at issue caused the disparate impact shown.

Moreover, there is nothing unfair in shifting the burden of proof to an employer once disparate impact of his personnel system has been demonstrated. It is well-established that disparate impact creates a presumption of discrimination because a fair, nondiscriminatory employment system should ordinarily produce a racially balanced workforce. Thus, to hold that an employer with a demonstrably unbalanced workforce is immune from Title VII challenge simply because the plaintiffs are unable to prove which specific practices caused what part of the disparity would, in all likelihood, allow significant violations of Title VII to go unremedied.

Furthermore, in many instances, the plaintiffs are unable to prove specific causation because either the evidence, such as detailed employment records, is unavailable or because plaintiffs lack sufficient expertise, resources or access to the place of employment. There is nothing unfair in asking the employer—who controls the maintenance of employment records, who is, of course, most expert in his own employment system and job criteria, and who enjoys complete access to the place of employment—to carry the burden of explaining away a demonstrable, significant racial disparity in his workforce.

3. Finally, petitioners contend that plaintiffs' statistics showing a significant disparity between the racial composition of petitioners' lower paid cannery workers and that of their higher paid non-cannery workers were not sufficient to carry plaintiffs' *prima facie* burden. Petitioners contend that only comparisons to the qualified labor pool are relevant.

Petitioners miss the point. This case is about barriers to *opportunity*. The plaintiffs' complaint here is that petitioners' employment practices unfairly denied them even the opportunity to compete for the higher paying non-cannery jobs. As this Court long ago recognized in *Griggs*, a core objective of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. In short, plaintiffs' statistics amply demonstrate discrimination in job opportunities; petitioners' labor force statistics are not even relevant to that claim.



## ARGUMENT

### I. IN A DISPARATE IMPACT CASE, AS THE NINTH CIRCUIT PROPERLY HELD, ONCE THE PLAINTIFF HAS MADE A PRIMA FACIE SHOWING, THE BURDEN OF PERSUASION SHIFTS TO THE EMPLOYER TO REBUT THAT PRIMA FACIE SHOWING.

Petitioners, supported by various *amici* including the United States, contend that in this case the Ninth Circuit Court of Appeals "fashion[ed] a new allocation of the burdens of proof in a [disparate] impact case, drastically lowering respondents' and raising petitioners'." (Pet. Brief at 37.) In summary, petitioners contend that the Ninth Circuit erred by holding that petitioners had the burden of disproving the plaintiffs' *prima facie* showing of disparate impact before plaintiffs had ever made out a *prima facie* case. (Pet. Brief at 37-47.) Petitioners argue that the Ninth Circuit improperly placed on them the burden of proving, rather than merely articulating, flaws in plaintiffs' *prima facie* showing of disparate impact. (*Id.*)

Petitioners miss the point of the Ninth Circuit's holding. The Ninth Circuit did not place the burden of disproving plaintiffs' statistics on petitioners; the Ninth Circuit held only that petitioners' objections to plaintiffs' *prima facie* showing must be relevant and probative. Because petitioners' objections were neither relevant nor probative, they failed to preclude a finding that plaintiffs had made out a *prima facie* case. There is nothing new or novel about that holding.<sup>2</sup>

The United States goes even further than petitioners. The United States contends that the Ninth Circuit erred by holding

<sup>2</sup> For example, the Ninth Circuit held that petitioners' labor force statistics were not relevant to undermine plaintiffs' workforce imbalance statistics because petitioners had failed to demonstrate that the qualifications criteria that underlay their labor force statistics were in fact used by petitioners. Indeed, plaintiffs presented evidence that those criteria were not used by petitioners. *Antonio v. Wards Cove Packing Co.*, 827 F.2d 439, 446 (9th Cir. 1987). That holding is nothing more than a straightforward application of this Court's holding in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976) that only non-discriminatory standards "actually applied" are relevant.

that, once plaintiffs in a Title VII case have made a *prima facie* showing of disparate impact, the burden of persuasion of rebutting that *prima facie* case shifts to the defendant employer. Rather, the United States contends, the employer's burden should be only to *articulate* a rebuttal to plaintiff's *prima facie* case. In short, the United States argues that the allocation of burdens of proof in a disparate impact class action should be exactly the same as in an individual disparate treatment case. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); (Brief for the United States as *Amicus Curiae* at 25-28.) Because of the far reaching implications of the United States' argument, we address it in detail below.

Simply put, the United States is wrong. *First*, individual disparate treatment cases and class action disparate impact cases are fundamentally different in theory and in practice and those differences amply justify a different allocation of burdens of proof. *Second*, the decisions of this Court applying disparate impact theory have, without exception, held that, once a *prima facie* case of disparate impact is established, the burden of *persuasion* shifts to the employer to rebut that *prima facie* case. Thus, the Ninth Circuit's ruling is not only not a "new allocation" of the burdens of proof in impact cases, it is the only ruling the Ninth Circuit could have made consistent with this Court's prior decisions. For this Court to adopt the United States' approach, it would have to overrule a long and unbroken line of authority set forth in this Court's own decisions. And *third*, there are sound public policy and practical reasons why in disparate impact cases the burden of persuasion should shift to the employer once a *prima facie* showing is made.

#### A. *The Differences between Individual Disparate Treatment Cases and Class-wide Disparate Impact Cases Warrant a Different Allocation of the Burdens of Proof.*

Title VII cases generally fall into two categories: disparate treatment and disparate impact.<sup>3</sup> Disparate treatment cases

<sup>3</sup> A particular case can utilize either or both methods of proof. As this Court has recognized, "[e]ither theory may, of course, be applied to a particular set



seek to remedy the most obvious evil Title VII was designed to eradicate, namely situations where an employer intentionally treats some people less favorably because of their race, color, religion, sex or national origin. In a disparate treatment case, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters*, 431 U.S. at 335 n. 15.

Disparate impact claims, in contrast, focus on employment practices and procedures that are facially neutral in their treat-

of facts." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n. 15 (1977).

Pattern and practice disparate treatment cases present yet a third category, combining elements of both disparate impact and individual disparate treatment cases. Pattern and practice disparate treatment cases are, at bottom, class actions predicated on allegations of disparate treatment. Like an individual disparate treatment case, the crux of a pattern and practice disparate treatment case is an employer's intentional and less favorable treatment of minority employees. Like a disparate impact case, however, the proof of discrimination in a pattern and practice disparate treatment case is generally statistical. In such a case, the mere articulation of a defense—such as the employer's assertion that it hires and promotes the "best-qualified" candidates—is insufficient. *Teamsters*, 431 U.S. at 342 n. 24; *Payne v. Travenol Laboratories*, 673 F.2d at 818. Similarly, the mere articulation of a potential flaw in plaintiffs' statistics is insufficient; the defendant has the burden of persuasion that the problems it cites are real, and that they explain so much of the disparities proven by plaintiffs that their probative value is destroyed. *Payne*, 673 F.2d at 822; *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. den.*, 449 U.S. 1078 (1981).

There is nothing unusual or unjust in these rulings. No matter how massive a plaintiff's statistical showing may be, it can never cover every possible factor. Universal analyses come only at infinite expense. To allow a probative statistical showing to be defeated by mere articulation or speculation that other factors or analyses might lead to a different result, without imposing any burden of persuasion on the defendant, would result in the defeat of every statistical showing of disparate treatment. It is for those reasons that Judge Higginbotham stated in *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656, 661 (N.D. Tex., 1981), *rev'd on other grounds*, 723 F.2d 1195 (5th Cir.), *cert. den.*, 469 U.S. 1073 (1984), that "[i]n a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence—to highlight the issues in context—is about as relevant as a minuet is to a thermonuclear battle."

ment of different groups but nevertheless in fact fall more harshly on one or more groups.<sup>4</sup> Proof of discriminatory motive is not necessary in disparate impact cases. Indeed, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

As a unanimous Court recognized in *Griggs*, disparate impact analysis promotes Congress' intent in Title VII to outlaw not only overt, intentional discrimination but also more subtle, unintended discrimination:

What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

... The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

*Griggs*, 401 U.S. at 431.

In an individual disparate treatment case, the plaintiff's burden in establishing a *prima facie* case is "not onerous". *Burdine*, 450 U.S. at 253. Essentially, the plaintiff need only prove that he is a member of a racial minority and eliminate the most common reasons for his failure to be hired or promoted or otherwise treated equally. See, e.g., *id.* at 253-54; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Such a minimal showing "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

The employer in an individual disparate treatment case then need only articulate a legitimate, nondiscriminatory reason for

<sup>4</sup> Most disparate impact cases are class actions. Individual disparate impact cases do exist, however, and the order of proof in such cases is, and should be, the same as in class action disparate impact cases.

its treatment of plaintiff and produce sufficient evidence to raise "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254. The minimal burden on the employer in responding to an individual disparate treatment plaintiff's *prima facie* case is commensurate with the low *prima facie* threshold for the plaintiff. The entire purpose of the order of proof in individual disparate treatment cases is to narrow the issue of the employer's intent gradually. Thus, the ultimate issue of discriminatory motive is most often decided, assuming plaintiff made a *prima facie* showing, at the final stage, when the plaintiff must prove that the employer's articulated non-discriminatory motive is a mere pretext for discrimination.

Said another way, it is not until the third and final stage of the order of proof in a disparate treatment case that the plaintiff actually proves discrimination by eliminating not only the most common nondiscriminatory motivations for the employer's apparently discriminatory treatment but also the particular nondiscriminatory reasons proffered by the employer. For that reason, this Court in *Burdine* refused in an individual disparate treatment case to place any burden of persuasion on the employer at the second stage in the order of proof.

In a disparate impact case, in contrast, the order of proof, and particularly the plaintiffs' *prima facie* burden, are significantly different. As this Court itself noted in *Burdine*, "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 252 n. 5. See also *Teamsters*, 431 U.S. at 336 n. 15 ("[c]laims of disparate treatment may be distinguished from claims that stress 'disparate impact'").

Thus, in a disparate impact case, the plaintiffs face a much higher *prima facie* burden of proof. There, the plaintiffs must prove, in order to make a *prima facie* showing, that the employer's facially neutral employment practices and procedures cause a disparate impact upon a protected class. E.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). That standard requires a substantial showing. The plaintiffs must prove, gener-

ally through the use of probative statistics, that the practices and procedures about which plaintiffs complain have a substantially disproportionate exclusionary impact on minorities. *Dothard v. Rawlinson*, 433 U.S. 321, 328-30 (1977).<sup>5</sup>

Once that standard is met, however, disparate impact plaintiffs have done far more than simply dispel the "most common" nondiscriminatory explanations for differences in employment results (as is the case with a disparate treatment *prima facie* case). See *Furnco*, 438 U.S. at 577. Rather, a *prima facie* showing in a disparate impact case convincingly demonstrates the very evil that that type of analysis is designed to uncover, in a fashion that unless rebutted by the employer will compel a ruling for the plaintiffs.<sup>6</sup> The heavier burden carried by plaintiffs in *prima facie* showings in disparate impact cases thus amply justifies the shifting of a burden of persuasion to the defendant. See B. Schlei and P. Grossman, *Employment Discrimination Law* at 1328 n. 139 (2d ed. 1983) ("[t]he heavier burden placed upon the defendant in responding to a *prima facie* case under the adverse impact model corresponds with the plaintiffs' heavier burden of establishing a *prima facie* case").

Indeed, the employer's burden in responding to a disparate impact *prima facie* case—to justify the business necessity of the challenged practices and procedures—is in the nature of an

<sup>5</sup> As this Court is well aware, and as this case convincingly demonstrates, the probative value of the statistics relied upon by a plaintiff class in a disparate impact case is often hotly disputed. The plaintiffs' burden to establish disparate impact by statistics is indeed an onerous one. See Part III *infra*. See also *Teamsters*, 431 U.S. at 340 & n. 20 (statistics come in an "infinite variety" and their usefulness "depends on all surrounding facts and circumstances").

<sup>6</sup> As this Court has noted, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters*, 431 U.S. at 340 n. 20. Thus, as Justice Blackmun stated in *Watson*, "[u]nlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is directly established by the numerical disparity." 487 U.S. at 108 S. Ct. at 2794.



affirmative defense. Once the plaintiffs have made a *prima facie* showing in a disparate impact case that the employment practices at issue are presumptively illegal, the employer can "save" those practices by demonstrating their business necessity. Unlike individual disparate treatment analysis—where, because the ultimate issue is the employer's intent, the employer need only articulate a nondiscriminatory motivation not already disproven by the plaintiff's *prima facie* showing—under disparate impact analysis the employer's burden is, after plaintiffs' have proven disparate impact, to avoid the conclusion of unlawful discrimination by proving the business necessity of the practices and procedures causing the disparate impact upon minorities. See, e.g., *Albermarle Paper Co.*, 422 U.S. at 425.<sup>7</sup>

In sum, disparate impact analysis focuses solely on the effect of an employer's practices. A *prima facie* showing of a statistical disparity in such a case is thus complete proof of unlawful discrimination by the employer that, unless rebutted by proof of the business necessity of the challenged practices, mandates a finding in favor of plaintiffs. In contrast, a *prima facie* showing in an individual disparate treatment case is nothing more than the first step in a process designed to ferret out the employer's intent. That is the difference between an individual disparate treatment *prima facie* showing and a disparate impact *prima facie* showing. And that is why it is entirely appropriate to shift the burden of proof, rather than merely production, to the employer in disparate impact analysis.

<sup>7</sup> That is not to say, of course, that the employer may not challenge the accuracy or significance of plaintiffs' statistics. *Dothard*, 433 U.S. at 431. However, once the court has found disparate impact, the employer can only *rebut* that finding by proving the business necessity of the offending practice. E.g., *Griggs*, 401 U.S. at 431-32. That is the very nature of an affirmative defense. See Fed. R. Civ. P. 8. Significantly, even petitioners agree that "business necessity" is an affirmative defense in disparate impact cases. (See Pet. Brief at 42 ("if the employer remains silent on the issue of disparate impact, that issue is established and he must come forward with what amounts to an affirmative defense of business necessity")).

**B. *This Court Has Uniformly Held that the Burden of Proving Business Necessity Shifts to the Employer Following a Prima Facie Showing in a Disparate Impact Case.***

Contrary to the suggestion of the United States (Brief for the United States at 25-28), this Court has consistently, indeed uniformly, held that in disparate impact cases, following a *prima facie* showing by plaintiffs, the burden of persuasion, not merely production, shifts to the employer. For this Court now to hold that the employer's burden in disparate impact cases is one of production alone would require the overruling of a long and unbroken line of decisions dating back to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is no basis, we submit, for such a radical departure from well-established authority.

Thus, in *Griggs* itself, this Court flatly held that, once a statistical showing of disparate impact is made, "Congress has placed on the employer *the burden of showing* that any given requirement must have a manifest relationship to the employment in question". 401 U.S. at 432 (emphasis added). Indeed, in *Griggs*, the employer articulated—but failed to prove—that its high school degree and standardized test requirements were related to successful job performance. This Court flatly rejected that proffer as insufficient to carry the employer's burden and reversed the Fourth Circuit's holding in favor of the employer. *Id.* at 431-36.

Similarly, in *Albermarle Paper Co.*, this Court expressly held that the burden of persuasion of business necessity shifts to the employer, once plaintiffs make a *prima facie* showing:

Title VII forbids the use of employment tests that are discriminatory in effect unless *the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question'*. This burden arises, of course, only after the complaining party or class has made out a *prima facie* case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *If an employer does then meet the burden of proving that its tests are 'job related'*, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesira-



ble racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'.

422 U.S. at 425 (citations omitted; emphasis added).

In *Albermarle*, as in *Griggs*, the defendant employer argued—but did not prove—that the tests at issue were job related, offering a post-litigation validation study done using job criteria that were not in fact used by the defendant but rather were created by defendant's expert. This Court had little trouble in rejecting that "proof" as insufficient to carry the defendant's burden. *Id.* at 429-36.

Likewise, in *Dothard*, this Court held that, once a *prima facie* showing of disparate impact is made, the burden shifts to the employer to "prove[] that the challenged requirements are job related". 433 U.S. at 329. The Court further held that, in a disparate impact case, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Id.* at 332 n. 14. In *Dothard*, the employer articulated that its height and weight requirements for prison guards were related to strength, which the employer further hypothesized was related to effective performance as a prison guard. This Court quickly rejected that business necessity defense on the ground that the employer had failed to prove the relationships it articulated:

We turn, therefore, to the appellants' argument that they have rebutted the *prima facie* case of discrimination by showing that the height and weight requirements are job related. . . . In the District Court, however, the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.

433 U.S. at 331.

In short, this Court has consistently, and often, held that the employer's burden in a disparate impact case is one of persuasion, not merely articulation. That is, and always has been, the understanding of Title VII practitioners representing both defendants and plaintiffs. There is no reason, we respectfully submit, for this Court now to overrule that long line of authority.

**C. Sound Reasons of Public Policy and Practicality Warrant the Shifting of the Burden of Persuasion to the Employer in Disparate Impact Cases.**

The only practical allocation of the burdens of proof in disparate impact cases is to shift the burden of persuasion of business necessity to the employer. Once the discriminatory effect of an employer's practices is shown by the plaintiff's *prima facie* case, only the employer can fairly be expected to demonstrate that the practices in question are necessary.

For example, in a disparate impact case concerning an employment test or other objective measurement, an employer will most often defend job relatedness based upon validation of the measurement in question. *See, e.g., Furnco*, 438 U.S. at 579-80. Validation is a complex, time consuming process and, as a practical matter, only the employer has sufficient access to, and familiarity with, the employment records and jobs at issue to conduct a validation study.<sup>8</sup> Indeed, validation studies generally cannot be done properly simply by reviewing existing records. The party conducting such a study needs substantial access to current employees in order to administer a test and to compare job success as predicted by the job requirement at issue to actual job success. Civil discovery and access to Equal Employment Opportunity Commission files are simply not adequate substitutes for the everyday access to the workplace enjoyed by employers. Indeed, plaintiffs are sometimes barred from any access to the workplace. *See Belcher v. Bassett Furniture Industries Inc.*, 588 F.2d 904 (4th Cir. 1978) (order granting plaintiffs' counsel and expert five days access to defendant's plant reversed as an abuse of discretion). Moreover,

<sup>8</sup> *Cf. Teamsters*, 431 U.S. at 360 n.45:

[T]he employer [is] in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records [are] the most relevant items of proof. If the refusal to hire [was] based on other factors, the employer and its agents [know] best what those factors were and the extent to which they influenced the decision making process.

validation requires scores of hours of work and a thorough familiarity with the requirements of the jobs at issue. Very few, if any, Title VII plaintiffs have the resources and the particular expertise necessary for such a validation, even if they had the requisite access to the workplace.<sup>9</sup>

Finally, sound public policy mandates that the burden of proving business necessity rest on the employer. If an employer's personnel practices and procedures result in a statistically significant disparate impact on a protected class or classes, the employer should immediately, as a matter of public policy, validate the business necessity of those practices and procedures. See *Uniform Guidelines on Selection Procedures*, 29 C.F.R. §§ 1607, 1615 (1978).<sup>10</sup> The employer should not wait until he is

<sup>9</sup> For much the same reason, plaintiffs in disparate impact cases and pattern and practice disparate treatment cases cannot be expected to foresee each and every objection that employers might articulate at trial to their statistics. Plaintiffs cannot, in discovery, prepare for every such objection. Thus, as a practical matter, only the employer has adequate access to the facts to prove that its objections to plaintiffs' statistics are soundly based in fact, and not merely hypothetical, and the employer should bear the burden of proving the factual basis of its objections. See, e.g., *United States v. County of Fairfax*, 629 F.2d at 940.

<sup>10</sup> That is not to say that an employer has a legal obligation to conduct validation studies as soon as a racial disparity is observed. We suggest only that this Court should encourage, rather than discourage, such employers from attempting to discover why such disparities exist and determining if the job requirements causing the disparity are truly necessary. Moreover, not all practices require formal validation studies. Many are valid on their face.

The Equal Employment Advisory Council ("EEAC") suggests in its *amicus* brief that validation studies cost between \$100,000.00 and \$400,000.00. (Brief for EEAC at 21 n. 4.) That estimate appears substantially high. Indeed, a survey of 1339 employers found that most validation studies cost as little as \$5,000.00. See Friedman and Williams, *Current Use of Tests for Employment*, in 2 *Ability Testing: Uses, Consequences, and Controversies* 104, 110-11 (1982) ("In all size categories, most companies that validated their test or nontest selection procedures spent less than \$5000 per job studied"). The EEAC further suggests that the Uniform Guidelines on Selection Procedures are inconsistent with "generally accepted professional practices in test development". (*Id.* at 21-22.) The American Psychological Association ("APA"), however, has gone on record with exactly the opposite position. Thus, in 1985, the APA wrote to EEOC Chairman Clarence Thomas that there was "no

sued under Title VII to verify the business necessity of such practices and procedures. If, however, the employer's burden in a Title VII disparate impact action is merely one of articulating business necessity, employers will be discouraged from conducting job validation studies in advance of litigation because to do so will expose them to a greater risk of liability (if, for example, the study fails to show validity) than they face in litigation where the plaintiffs are unlikely to be able to conduct a definitive validation study.<sup>11</sup>

## II. SPECIFIC CAUSATION IS NOT THE APPROPRIATE STANDARD IN A DISPARATE IMPACT CASE

Petitioners further contend that, in a disparate impact case, the plaintiffs should not be allowed to challenge the cumulative effect of an employer's personnel practices but rather should be required to identify specific practices and demonstrate a specific disparate impact causally associated with each practice at issue. (Pet. Brief at 30-36.) Relying on *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982), petitioners argue that the disparate impact model is not "the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of a company's employment practices." (Pet. Brief at 30 (quoting *Pouncy*, 668 F.2d at 800).)

Petitioners' argument addresses an issue not fairly presented by this case. Indeed, the short answer to petitioner's contention

compelling reason for revising" the uniform Guidelines on "technical grounds". 110 Daily Labor Rep. (BNA) A-3 (June 7, 1985).

<sup>11</sup> That analysis does not change when an employer's subjective personnel policies are at issue. First, subjective personnel policies, like objective tests and other measurements, can be validated. See, e.g., Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 San Diego L. Rev. 63, 87-89 (1988). And second, in any event, the employer, who is by definition the party most familiar with the requirements of the jobs at issue, is still in the best position to defend the necessity of the practices at issue. That fact does not change simply because the practices are subjective in nature. And if the employer cannot defend the business necessity of his subjective personnel system in a Title VII case where disparate impact has been proven, he should not prevail.



is that this is not a case in which the plaintiffs made a shotgun, undifferentiated attack on the cumulative effect of an employer's personnel practices and procedures. To the contrary, plaintiffs challenged sixteen specific personnel practices used by petitioners. With respect to six of those practices, the Ninth Circuit Court of Appeals held that plaintiffs' challenges were well-founded. Thus, upon a review of the trial record, the Ninth Circuit found that petitioners' use of subjective criteria in making hiring decisions, petitioners' nepotism policy, petitioners' use of separate hiring channels and word-of-mouth recruitment for cannery and non-cannery jobs, and petitioners' race labelling and segregated facilities caused a discriminatory impact upon minorities. For each of those practices, we submit, simple logic and well-established legal authority in this Court and the courts of appeals amply demonstrate a causal connection to disparate impact.

1. *Subjective Criteria*: As this Court recognized only last term, the use of subjective criteria by a predominantly white, male supervisory force inevitably raises problems of "subconscious stereotypes and prejudices". *Watson v. Fort Worth Bank and Trust*, 487 U.S. , 108 S.Ct. at 2780 (1988). Courts of appeals have likewise recognized that the use of subjective criteria in employment decision-making presents a "ready mechanism" for discrimination, intentional or unintentional. *E.g.*, *EEOC v. Inland Marine Industries*, 729 F.2d 1229, 1236 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972).
2. *Nepotism*: Nepotism is, by definition, a practice of giving preference to relatives of current employees. Where the current employees are predominantly white, nepotism necessarily has an adverse impact on minorities. *See, e.g.*, *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Gibson v. Local 40*, 543 F.2d 1259, 1268 (9th Cir. 1976).
3. *Separate hiring channels and word-of-mouth recruitment*: Where two work forces within a company

have significantly different racial compositions and the company employs both separate hiring channels and word-of-mouth recruitment the potential—indeed, the likelihood—for disparate impact upon minorities is obvious. Thus, where the already predominantly white supervisory force hires through word-of-mouth recruiting, it is only logical to expect that a predominantly white workforce will be perpetuated. *E.g.*, *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

4. *Race labelling and segregated facilities*: Race labelling and segregated facilities—particularly in combination with the use of subjective criteria and word-of-mouth recruiting—similarly have an obvious, and adverse, impact upon the employment opportunities of minorities. Race labelling and segregated facilities reflect an obvious attitudinal "headwind" in the way of employment opportunities for minorities. *See, e.g.*, *Griggs*, 401 U.S. at 432; *Lilly v. Harris-Teater Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988). More to the point, if minorities are relegated to segregated facilities, they are isolated from the news of job opportunities spread by word-of-mouth among white employees. *See, e.g.*, *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973); *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 435 (W.D. Wash. 1977), *aff'd*, 727 F.2d 1429 (9th Cir.), *modified*, 742 F.2d 520 (9th Cir. 1984).

In sum, the causal connection between the practices about which plaintiffs complain here and disparate impact upon minorities is well-established. For petitioners to claim that



plaintiffs did not prove a causal connection flies in the face of both law and logic.<sup>12</sup>

Moreover, it would be virtually impossible for plaintiffs to prove with any more specificity the causal connection between a particular subjective practice and a particular disparate impact. Employers often do not maintain records that clearly show why certain applicants were hired or promoted and others were not. Absent such records, plaintiffs cannot hope to prove specific causation of disparate impact in hiring or promotion. And even statistical techniques often cannot fill that evidentiary gap. For example, multiple regression analysis can identify the significance of specified objective criteria to pay rates or hire rates. *Bazemore v. Friday*, 478 U.S. 385 (1986); *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), *vacated*, 459 U.S. 809 (1982), *aff'd on rehearing*, 695 F.2d 134 (5th Cir. 1983). However, multiple regression analysis is ill-suited to deal with unquantifiable variables such as subjective hiring criteria. Indeed, it is difficult to envision any method of isolating the significance of an individual subjective practice in such a situation, particularly by the plaintiffs who necessarily have far less

<sup>12</sup> Moreover, the alternatives to these practices are obvious and cannot seriously be contended to be onerous. First, word of mouth recruiting can be easily replaced and/or supplemented with a job posting system at the canneries during the season, and at recruitment sites throughout the year. Second, the effect of separate hiring channels can be modified or eliminated by enabling company recruiters to recruit and provide information for all jobs (*i.e.*, a recruiter going to an Alaskan Native village would be in a position to recruit individuals with skill as mechanics and not just for cannery workers). Third, with regard to subjective criteria, it is not a tremendous burden for the employers to establish and use objective job descriptions; such job descriptions would allow an applicant to determine his or her qualifications for a position and would provide a standard by which applicants could reasonably be judged. Job descriptions are, in fact, a reasonable and fairly standard managerial practice. Fourth, with regard to race labelling and segregated facilities, the alternatives are simple and obvious. What justification can there be for assigning employee numbers by ethnic origin or referring to facilities—bunkhouses, mess halls, etc.—by racial terms. And fifth, nepotism plainly has no significant relationship to job performance. Relatives of existing workers have no special qualifications necessarily for the jobs at issue. There can be no hardship in simply eliminating nepotistic hiring.

familiarity with the personnel system at issue than the defendant employer.<sup>13</sup>

In any event, it lies ill in the mouths of these petitioners to contend that allowing a disparate impact attack on the cumulative effect of multiple employment practices is somehow unfair to employers. (See Pet. Brief at 30-36.) Notwithstanding their protestations of the inability of employers' to respond to cumulative attacks, petitioners flatly claim to have proven the business necessity of each and every practice at issue. (See Pet. Brief at 36 ("even if petitioners in this case had such a burden, they have met it").)

Finally, even if the issue of the viability of a cumulative effects challenge were properly before this Court in this case, there is nothing unfair or inconsistent with Title VII theory in such a challenge. Indeed, even the United States concedes in its *amicus* brief that, in at least a multistage decision case, multifactor selection decisions may be challenged as a whole. (Brief for the United States at 22). See also *Teal*, 457 U.S. at 450 (Powell, J., dissenting) ("our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group") (emphasis in original).

The Government's concession is, we submit, compelled by this Court's prior decisions and simple logic. *First*, it should not be forgotten that the *sine qua non* of a cumulative effects challenge is a statistical showing of a significant inequality in the employer's workforce statistics. If the employer's personnel system were working fairly and impartially, one would not expect to see such a statistical disparity. *E.g.*, *Teamsters*, 431 U.S. at 340 n.20.

<sup>13</sup> Even to attempt such proof of specific causation is a daunting task. For example, in a disparate impact case against the City of Houston, Texas, the Lawyers' Committee sought to "disaggregate" over twenty different standards used by the employer and identify their specific disparate impact. That effort required the duplication of almost 150,000 pages of the defendant's records and the employment of approximately twenty temporary workers to review those records. That effort was, to say the least, extremely expensive. See *Tarver v. City of Houston*, 22 EPD 30,689 at p. 14,627 (S.D. Tex. 1980).

Thus, to hold that an employer is immune from Title VII challenge simply because the plaintiffs are unable to identify the specific practice or practices causing specific portions of the disparate impact would, in all likelihood, allow significant examples of employment discrimination to go unremedied. See *Green v. USX Corp.*, 843 F.2d 1511, 1521-22 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141).

*Second*, the broad remedial purpose, and express statutory language, of Title VII support the proposition that cumulative effects challenges are proper. Indeed, in a Senate Report prepared during the passage of the 1972 amendments to Title VII, Congress noted that employment "systems" can be, and often are, the cause of discrimination:

Employment discrimination is viewed today as a ... complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simple intentional wrongs.

S. Rep. No. 415, 92nd Cong., 1st Sess. 5 (1971) (emphasis added).

Similarly, the express language of 703(a)(2) of Title VII provides broadly that it is an unlawful employment practice for an employer

to limit, segregate or classify his employees or applicants for employment *in any way* which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2 (emphasis added).<sup>14</sup>

Congress' broad proscription of employment practices that discriminate "in any way" is certainly broad enough to encompass challenges to the cumulative effects of personnel systems. As this Court noted in *Griggs*, Congress intended in Title VII to

<sup>14</sup> In *Teal*, 457 U.S. at 448, this Court noted that disparate impact analysis is based on § 703(a)(2) of Title VII.

outlaw any and all employment practices that unnecessarily operate "as 'built-in headwinds' for minority groups." 401 U.S. at 432. Thus, if the cumulative effects of an employer's entire personnel system deprive minorities of employment opportunities, it would be flatly inconsistent with the purpose of Title VII to exonerate that system absent a showing by the employer that its system is justified by business necessity (or, at least, that the practices and procedures the employer shows caused the disparate impact are justified).

Indeed, the Uniform Guidelines on Employee Selection Procedures promulgated by the EEOC, Civil Service Commission and Departments of Labor and Justice support that conclusion. Those Procedures specifically define the employment practices that are subject to disparate impact review to include combinations of practices. The Guidelines provide that disparate impact analysis applies to

[a]ny measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational and work experience requirements through informal or casual interviews and unscored application forms.

29 C.F.R. § 1607.16(Q) (emphasis added).<sup>15</sup>

*Third*, contrary to the assertions of petitioners and the United States as *amicus curiae*, there is nothing unfair about shifting the burden to the employer to choose whether disaggregation would serve its interests and, if so, to identify the practices causing disparate impact and to justify the business necessity of those practices once the plaintiffs have shown a disparity. It is employers who are most knowledgeable about their own personnel systems. And it is employers who have the best access to evidence concerning those systems. As the Third Circuit recently noted:

<sup>15</sup> This Court has expressly held that the Uniform Guidelines are "entitled to great deference" as "the administrative interpretation of [Title VII] by the enforcing agency". *Albermarle*, 422 U.S. at 431; *Griggs*, 401 U.S. at 433-34.



Applying disparate impact analysis to this employer's hiring 'system' and measuring the disproportionate 'effects' on minority hiring that result may impose a difficult burden on the employer, but not an unfair one. *In these cases the employer has far better access and opportunity than the plaintiffs to evaluate critically the inter-relationship of the criteria that it uses in hiring practice, and to determine which aspects actually result in discrimination.*

*Green v. USX Corp.*, 843 F.2d at 1524 (emphasis added). See also *Segar v. Smith*, 738 F.2d 1249, 1271 (D.C. Cir. 1984), cert. denied, 471, U.S. 1115 (1985).

And fourth, should this Court hold that it is always the plaintiffs' burden to link specific employment practices with specific disparities, the result will be to encourage employers to have no personnel system at all, or to structure their employment systems in as complicated a fashion as possible (which may be the functional equivalent of no system at all), and to maintain as few personnel records as possible. In that way, employers may well be able to render themselves immune from Title VII attack, no matter how skewed their employment statistics might be, because plaintiffs will be unable to identify the practice or prac-

tices that caused discrimination and/or prove the causal link. This Court, we submit, should not encourage such a result.<sup>16</sup>

### III. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS' STATISTICS MADE OUT A PRIMA FACIE CASE OF DISPARATE IMPACT

Finally, petitioners contend, again supported by the United States as *amicus curiae*, that plaintiffs' statistics which show a

<sup>16</sup> In its *amicus* brief, the United States suggests that this Court adopt a single governing formulation with respect to the inquiry into business justification once a plaintiff has made out a prima facie case under the disparate impact mode. (Brief for the United States at 23-25.) The United States proposes that this Court adopt a standard allegedly "encapsulated" in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Thus, the United States would find a challenged practice justified as a business necessity where the employer's "legitimate employment goals of safety and efficiency . . . are significantly served by—even if they do not require—[the challenged selection practice]". That issue is not presented in this case, however, and we respectfully submit that this Court should not address an issue not briefed, argued or decided in the courts below and not the subject of this Court's writ of certiorari.

Furthermore, the standard proposed by the United States is too low and would thwart the central purpose of Title VII. As Justice Blackmun recognized in his concurrence in *Watson*, "[p]recisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula". *Watson*, 487 U.S. at 108 S.Ct. at 2794. Nevertheless, it is well-established that a mere "significant" relationship to "legitimate employment goals" is not enough. "Congress has placed on the employer the burden of showing that any given requirement must have a *manifest relationship* to the employment in question." *Griggs*, 401 U.S. at 432 (emphasis supplied). As *Griggs* made clear, "[t]he touchstone is business necessity." 401 U.S. at 301.

Moreover, in *Beazer*, this Court did not follow the standard that the United States proposes but merely recognized that the district court had made a finding that the defendant's employment goals of safety and efficiency actually *did* require the exclusion of all users of illegal narcotics. The Court did not adopt a mere "relationship" standard as the employer's burden in a disparate impact case. To the contrary, the Court expressly followed the standard articulated in *Griggs*, noting that the record in *Beazer* sufficiently reflected that the defendant's rule demonstrated a "manifest relationship to the employment in question". *Beazer*, 440 U.S. at 587 n. 31 (quoting *Griggs*, 401 U.S. at 438).



striking disparity between a concentration of minority workers in lower level, lower paid cannery jobs and a paucity of minorities in higher level, higher paid non-cannery jobs fail to make a *prima facie* showing of disparate impact. In summary, petitioners contend that only statistics which compare the number of minorities in non-cannery jobs and the number of minorities in the qualified labor force are relevant here. (Pet. Brief at 15-24. See also Brief for the United States at 16-21.)

Petitioners have missed the point. This case is not about a simple comparison of the number of minorities in the non-cannery jobs and in the qualified labor pool. This case is about petitioners' recruiting practices and the systematic exclusion of minorities in low paid cannery positions from the opportunity to even apply, much less be hired, for the higher paid non-cannery jobs. For those issues, plaintiffs' comparison between the number of minorities in cannery jobs and the number of minorities in non-cannery jobs is entirely proper.

As the Fifth Circuit has stated:

'In the problem of racial discrimination, statistics often tell much, and Courts listen.' . . . Our wide experience with cases involving racial discrimination in education, employment, and other segments of society has led us to rely heavily in Title VII cases on the empirical data which shows an employer's overall pattern of conduct in determining whether he has discriminated against particular individuals or a class as a whole.

*Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 305 (5th Cir. 1973) (citations omitted).<sup>17</sup>

There is no uniform rule that determines what types of statistics are useful in what types of cases. The relevancy of particular

<sup>17</sup> See also *Teamsters*, 431 U.S. at 340 n. 20, quoting B. Schlei and P. Grossman, *Employment Discrimination Law* at 1161-93 (1976):

Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

statistical showings can only be determined on a case-by-case basis. See, e.g., *Hazelwood School District v. United States*, 433 U.S. at 311-12; *Falcon v. General Telephone Co. of the Southwest*, 626 F.2d 369, 382 (5th Cir. 1980), *vacated*, 450 U.S. 1036, *aff'd on rehearing*, 647 F.2d 633 (5th Cir. 1981); *Davis v. City of Dallas*, 483 F. Supp. 54, 60 (N.D. Tex. 1979). As this Court pointed out in *Teamsters*, statistics "come in infinite variety" and "their usefulness depends on all of the surrounding facts and circumstances". 431 U.S. at 340. There is, in short, no hard and fast rule that statistical comparison in Title VII cases must be between the employer's workforce and the "qualified labor pool".

This is a unique case, involving seasonal work, often performed by migrant workers under exceptionally difficult conditions. Routine statistical analyses do not apply. The facts and circumstances of this case mandate an approach to the relevant statistics tailored to the facts of this case.

Thus, here, a comparison to the so-called qualified labor force is beside the point. The crux of the issues raised by plaintiffs' challenges to petitioners' employment practices is the claim that those practices denied cannery workers the opportunity to compete fairly for higher paying non-cannery jobs. By employing such hiring techniques as nepotism, word-of-mouth recruiting, separate hiring channels and use of subjective criteria, petitioners effectively precluded minority cannery workers from applying or being hired for non-cannery jobs. Similarly, such practices as race labelling and segregated facilities contributed substantially to a lack of knowledge of job opportunities on the part of minority cannery workers.<sup>18</sup> In total, those techniques assured that the current racial make-up of petitioners' non-cannery workforce would be perpetuated.

<sup>18</sup> Petitioners contend that plaintiffs' workforce comparison statistics are irrelevant because petitioners do not have a "promote from within" policy. That again misses the point. Whether or not petitioners have such a policy, it is a violation of Title VII to use employment practices that actively preclude lower level minority workers from the opportunity even to be considered for higher level positions where those practices cause disparate impact.

The fact that petitioners' non-cannery workforce may reflect the racial breakdown of the qualified outside workforce is simply irrelevant to the issue of opportunity here. As this Court recognized in *Connecticut v. Teal*, 457 U.S. 440 (1982), the "bottom line" of petitioners' hiring practices is not a defense to a claim that those practices unlawfully curtail employment opportunities for minorities:

In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

\* \* \*

... The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job related criteria.

*Id.* at 450-51 (emphasis in original).

Moreover, petitioners, as the Court of Appeals properly found, cannot properly rely on their so-called qualified labor force statistics. As an initial matter, and as the district court found, Pet. App. I at 75-76, many of the non-cannery jobs at issue here were unskilled and hence required no particular qualification. Accordingly, the cannery workers plainly should have been eligible for those jobs. More generally, however, petitioners never proved that their purported job qualifications criteria were actually applied.<sup>19</sup> Absent such proof, petitioners' qualified labor force statistics are irrelevant and worthless. *E.g.*, *Franks v. Bowman Transportation Co.*, 424 U.S. at 773 n. 32 (only non-discriminatory standards "actually applied" by employers are relevant).

<sup>19</sup> See, e.g., Pet. App. at A-574-75 (trial testimony of Larry L. DeFrance); Pet. App. at A-236 (Deposition of Warner Leonard).

In sum, the Ninth Circuit properly held that plaintiffs' statistics made a *prima facie* showing of disparate impact of discrimination in job opportunities.<sup>20</sup>

## CONCLUSION

In recent years, the number of employment discrimination class actions filed has declined precipitously, from a peak of 1,174 in 1976 to only 46 in 1988.<sup>21</sup> A portion of that decrease may be attributable to a decline in employment discrimination in the United States, but there can be little doubt that private enforcement of Title VII through class actions has suffered substantially in recent years as the cost in money and effort of prosecuting Title VII class actions has risen substantially, if not exponentially. If the burdens of proof in disparate impact cases are revised as espoused by petitioners and the United States to further increase substantially, indeed drastically, the burden of proof on plaintiffs and correspondingly decrease the employer's rebuttal burden, we fear that no plaintiffs will have the resources or, indeed, the incentive to pursue Title VII class actions. The most important method of enforcement of Title VII—the class action—may, for all practical purposes, cease to exist. That would, we submit, be a most unfortunate result for the cause of equal employment opportunity.

<sup>20</sup> If this Court should conclude that the facts of record do not make out a *prima facie* case of disparate impact, then we respectfully suggest that the Court remand this matter for the presentation of further evidence and findings by the District Court. As the appellate process in this case demonstrates, given two panel opinions and one *en banc* decision, as well as this Court's opinion, the legal standards governing plaintiffs' case have shifted considerably during the litigation. Accordingly, plaintiffs should be given an appropriate opportunity to conform the evidence to the proper legal standard. See, e.g., *Albermarle*, 422 U.S. at 436 (where the Court remanded the case to the District Court to allow both the plaintiffs and the defendant to revise their evidentiary showings to conform to the new legal standards set forth in the Court's opinion).

<sup>21</sup> 1977 Report of the Director, Administrative Office of the U.S. Courts, Table 32, p. 239; Table X-5, Unpublished Computer Analysis prepared by the Administrative Office of the U. S. Courts.

Accordingly, for the reasons set forth above, the Lawyers' Committee for Civil Rights Under Law respectfully submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

CONRAD HARPER  
STUART J. LAND  
Co-Chairmen  
NORMAN REDLICH  
Trustee  
RICHARD T. SEYMOUR  
JAMES C. GRAY, JR.  
  
LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS  
UNDER LAW  
1400 "Eye" Street, N.W.  
Suite 400  
Washington, D. C. 20005  
(202) 371-1212

NICHOLAS DEB. KATZENBACH\*  
ALAN E. KRAUS  
DAVID ARCISZEWSKI  
  
RIKER, DANZIG, SCHERER,  
HYLAND & PERRETTI  
Headquarters Plaza  
One Speedwell Avenue  
Morristown, New Jersey  
07960-1981  
(201) 538-0800

Attorneys for Amicus Curiae  
Lawyers' Committee for Civil Rights  
Under Law \*

November 4, 1988

---

\*Counsel of Record



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC., and  
CASTLE & COOKE, INC.,

*Petitioners,*

v.

FRANK ATONIO, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR THE NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN  
LEGAL DEFENSE AND EDUCATIONAL FUND, AND  
THE PUERTO RICAN LEGAL DEFENSE AND  
EDUCATION FUND AS AMICI CURIAE  
SUPPORTING RESPONDENTS**

ANTONIA HERNANDEZ  
E. RICHARD LARSON  
JOSE ROBERTO JUAREZ, JR.  
Mexican American Legal  
Defense and Educational  
Fund  
634 South Spring Street  
11th Floor  
Los Angeles, CA 90014  
(213) 629-2512

RUBEN FRANCO  
KENNETH KIMERLING  
Puerto Rican Legal Defense  
and Education Fund  
99 Hudson Street  
New York, N.Y. 10013  
(212) 219-3360

JULIUS LEVONNE CHAMBERS  
CHARLES STEPHEN RALSTON  
RONALD L. ELLIS  
NAACP Legal Defense and  
Educational Fund, Inc.  
99 Hudson Street  
New York, N.Y. 10013  
(212) 219-1900

BILL LANN LEE\*  
PATRICK O. PATTERSON, JR.  
THEODORE M. SHAW  
NAACP Legal Defense and  
Educational Fund, Inc.  
634 South Spring Street  
Suite 800  
Los Angeles, CA 90014  
(213) 624-2405

*Counsel for Amici Curiae*

\*Counsel of Record

71PP

## QUESTIONS PRESENTED

1. Whether, on the facts of this case, the court of appeals correctly held that the evidence established a prima facie case of disparate impact.

2. Whether this Court should overrule the evidentiary standards for disparate impact cases articulated in Griggs v. Duke Power Co. and its progeny.

3. Whether, on the facts of this case, the court of appeals correctly considered the cumulative effect of a range of employment practices as demonstrating the consequences of discriminatory practices that had already been independently established.

## TABLE OF CONTENTS

	<u>Page</u>
Interest of Amici Curiae . . . . .	1
Summary of Argument . . . . .	2
 ARGUMENT	
I. TITLE VII, BY ITS TERMS, PROHIBITS DISPARATE IMPACT DISCRIMINATION AS WELL AS DISPARATE TREATMENT DISCRIMINATION . . . . .	9
II. THE LEGISLATIVE HISTORY OF TITLE VII, THE 1972 AMENDMENTS, AND THE UNIFORM ADMINISTRATIVE INTERPRETATION OF THE STATUTE DEMONSTRATE THAT THE EVIDENTIARY STANDARDS ARTICULATED IN <u>GRIGGS</u> AND ITS PROGENY ARE CONSISTENT WITH THE INTENT OF CONGRESS . . . . .	13
A. In Enacting §703(a)(2) In 1964, Congress Specifically Intended To Prohibit "Institutionalized" Disparate Impact Discrim- ination Not Motivated By Any Discriminatory Purpose . . . . .	13
B. In Amending Title VII In 1972, Congress Ratified The §703(a)(2) Evidentiary Standards Articulated In <u>Griggs</u> . . . . .	20

C. The Evidentiary Standards Of <u>Griggs</u> And Its Progeny Have Been Uniformly Confirmed By Administrative Interpretations Of §703(a)(2) . . . . .	26
 III. THE SEPARATE EVIDENTIARY ANALYSES DEVELOPED BY THE COURT REFLECT THE DISTINCT NATURE OF THE DISCRIMINATORY PRACTICES CONGRESS INTENDED TO PROSCRIBE IN §§703(a)(1) AND 703(a)(2) . . . . .	
A. The Court Has Articulated Evidentiary Standards For Analyzing Disparate Treatment Claims Under Section 703(a)(1) . . . . .	30
1. <u>Individual Disparate Treatment</u> . . . . .	31
2. <u>Direct Evidence of Intentional Discrimination</u> . . . . .	33
3. <u>Pattern or Practice of Intentional Discrimination</u> . . . . .	35
B. The Court Has Articulated Separate Evidentiary Standards For Analyzing Disparate Impact Claims Under Section 703(a)(2) . . . . .	36
C. The <u>Griggs</u> Disparate Impact Analysis Is Analogous To The	



Teamsters And Thurston  
Disparate Treatment  
Analyses . . . . .

44

IV. OVERRULING THE EVIDENTIARY STANDARDS OF <u>GRIGGS</u> AND ITS PROGENY WOULD BE CONTRARY TO THE REMEDIAL PURPOSE OF TITLE VII. . . . .	47
V. THE FIRST AND THIRD QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI ARE NOT PRESENTED BY THE FACTS OF THIS CASE . . . . .	54
CONCLUSION . . . . .	62

Table of Authorities

Page

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . . . . .	21, 27, 38, 41, 60
Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987) . . . . .	11
Connecticut v. Teal, 457 U.S. 440 . . . . .	6, 20, 21, 26, 38, 59
Dothard v. Rawlinson, 433 U.S. 321 (1977) . . . . .	37, 41
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) . . . . .	27
Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), <u>cert. denied</u> , 452 U.S. 938 (1981) . . . . .	53
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) . . . . .	21, 35
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) . . . . .	32, 43
General Electric Co. v. Gilbert, 429 U.S. 141 (1976) . . . . .	27
Green v. USX Corp., 843 F.2d 1511 (3rd Cir. 1988) . . . . .	59

Griggs v. Duke Power Co., 401 U.S. 424 (1971) . . . . .	passim
Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983) . . . . .	42
Hazelwood School District v. United States, 433 U.S. 299 (1977) . . .	36
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) . . . . .	passim
Johnson v. Railway Express Agency, 421 U.S. 454 (1975) . . . . .	21
Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 25, 26, 27	
Local 93, Firefighters v. City of Cleveland, 478 U.S. 501 (1986). .27	
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) . . . . .	11, 34, 35
Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) . . . . .	38
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) . . . . .	passim
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). . . . .	11, 12, 13, 39
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) . . .	41
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) . . . . .	34, 35

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) . . . . .	59
Texas Department of Community Affairs v. Burdine 450 U.S. 248, n. 8 (1981) . . . . .	31, 32, 33, 40, 43, 50
Tillery v. Pacific Tel. Co., 34 FEP Cases 54 (N.D. Cal. 1982) . .	53
Trans World Airlines v. Thurston, 469 U.S. 111 (1985) . . . . .	8, 31, 33, 34, 44, 45, 46
Wade v. Mississippi Coop. Extension Serv., 615 F. Supp. 1574 (N.D. Miss. 1985). . . . .	53
Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), <u>cert.</u> <u>denied</u> , 467 U.S. 1255 (1984). . .	11
Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) . . . . .	3, 5, 32, 38, 41, 48
Wilson v. Michigan Bell Tel. Co., 550 F. Supp. 1296 (E.D. Mich. 1982) . . . . .	53
<u>Legislative Materials:</u>	
H.R. 405 . . . . .	15
H.R. Rep. No. 88-570 . . . . .	16
H.R. Rep. No. 92-238 . . . . .	22, 23, 24
88 Cong., 1st Sess. 144-45 (1963) . .	19
110 Cong. Rec. 6307 (1964). . . . .	19

117 Cong. Rec. 32108 (1971) . . . . .	.51
117 Cong. Rec. 38402 (1971) . . . . .	.51
118 Cong. Rec. 697 (1972) . . . . .	22, 25
118 Cong. Rec. 7166 (1972) . . . . .	25
S. Rep. No. 88-867 (1964) . . . . .	17
S. Rep. No. 92-415 . . . . .	22, 23

Statutes:

42 U.S.C. § 2000e-2(a)(1) . . . . .	passim
42 U.S.C. § 2000e-2(a)(2) . . . . .	passim

Administrative Materials:

29 C.F.R. § 1607 (1986) . . . . .	.28
29 C.F.R. § 1607.3 (1970) . . . . .	28, 29
35 Fed. Reg. 12333 (1970) . . . . .	.28
35 Fed. Reg. 12336 (29 C.F.R. § 1607.11) . . . . .	.28
43 Fed. Reg. (1978) . . . . .	.28

Other Authorities:

B. Schlei & P. Grossman, <u>Employment Discrimination Law</u> , 702 (2d ed. 1983) . . . . .	52
Rose, <u>Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?</u> , 25 San Diego L.R. 63 (1988) . . . . .	14, 52

No. 87-1387

---

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1988

---

WARDS COVE PACKING COMPANY, INC., and  
CASTLE & COOKE, INC.,

Petitioners,

v.

FRANK ATONIO, et al.,

Respondents.

---

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC., THE MEXICAN  
AMERICAN LEGAL DEFENSE AND EDUCATIONAL  
FUND, AND THE PUERTO RICAN LEGAL DEFENSE  
AND EDUCATION FUND AS AMICI CURIAE  
SUPPORTING RESPONDENTS

---

INTEREST OF AMICI CURIAE

Amicus NAACP Legal Defense and  
Educational Fund, Inc., is a national  
civil rights legal organization that has  
litigated many cases on behalf of black



persons seeking vindication of their civil rights, including Griggs v. Duke Power Co., 401 U.S. 424 (1971). Amicus Mexican American Legal Defense and Educational Fund and amicus Puerto Rican Legal Defense and Education Fund are national civil rights organizations that have brought various lawsuits on behalf of Latino persons subject to discrimination in employment, education, voting rights and other areas of public life. Letters from the parties consenting to the filing of this brief have been filed with the Court.

#### SUMMARY OF ARGUMENT

Amici, supporting respondents, principally address the important issue raised by the second question presented in the petition for certiorari -- viz., the continued vitality of Griggs v. Duke Power Co.

In Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2785 (1988) (part IIA), Justice O'Connor, writing for the Court and citing Griggs, reiterated that Title VII proscribes not only intentional, disparate treatment discrimination but also disparate impact discrimination: "This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent." The Watson opinion also observed that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Id. (emphasis added).

The petitioners in this case concede that, "[u]nder a strict reading of

Griggs," once the plaintiff has established a prima facie case of disparate impact the employer "must come forward with what amounts to an affirmative defense of business necessity." Brief for Petitioners at 42 (citation and footnote omitted). The Solicitor General, however, distorts the language of Watson to argue that Griggs' burden of proof standards are "[b]ased on the assumption that certain other exclusionary practices are 'functionally equivalent to intentional discrimination.'" Brief for the United States as Amicus Curiae at 13. The Solicitor General then goes on to argue that, once the plaintiff has established a prima facie case of disparate impact discrimination, the employer's burden of demonstrating business necessity should be revised to conform to the employer's

minimal burden of production imposed under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in individual disparate treatment cases. Id. at 27 ("Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases"). Compare Watson, 108 S. Ct. at 2787-2791 (parts II C&D) (O'Connor, J.).<sup>1</sup>

The Solicitor General's argument conflicts with the language of the statute, its legislative history and contemporaneous administrative interpretations, the prior decisions of

---

<sup>1</sup>In Watson, the Solicitor General argued that subjective employment practices could only be analyzed under an intentional discrimination standard. See 108 S. Ct. at 2786. The Court rejected the argument. In the present case, the Solicitor General seeks to accomplish indirectly -- through the subterfuge of modifying disparate impact standards of proof to conform to individual disparate treatment standards -- what the Court directly rejected in Watson.

this Court, and the remedial purpose of Title VII.

1. "A disparate impact claim reflects the language of §703(a)(2)," Connecticut v. Teal, 457 U.S. 440, 448 (1982), which proscribes practices that "deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. §2000e-2(a)(2). The individual disparate treatment analysis, on the other hand, is one of several evidentiary models for analyzing violations of §703(a)(1), 42 U.S.C. §2000e-2(a)(1).

2. The legislative history of Title VII's enactment in 1964, and of its amendment in 1972, both undermine the Solicitor General's argument. In 1964, Congress made unmistakably clear that it intended to prohibit both intentional discrimination and disparate impact discrimination. Purposeful, overt

discrimination was not regarded as a paradigm; Congress expressly declared that Title VII reached beyond overt practices. In 1972, Congress specifically ratified Griggs and its evidentiary standards for disparate impact cases. Contemporaneous administrative interpretations of Title VII, including those of the Department of Justice and the EEOC, have uniformly applied the Griggs disparate impact analysis to all selection procedures with an adverse impact, and they have separately prohibited disparate treatment.

3. Based on the language and legislative history of §703(a), the Court has developed separate evidentiary analyses that recognize the basic differences between disparate treatment and disparate impact discrimination. The individual disparate treatment analysis of McDonnell Douglas serves different ends



than those served by the disparate impact analysis of Griggs; the stages of the two evidentiary models are specific to each analysis and are in no way comparable. The more appropriate analogy for the employer's burden in a disparate impact case -- if an analogy is necessary-- would be the employer's burden in class-based disparate treatment cases, such as International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

4. The Solicitor General's theory, if accepted, would frustrate the remedial purpose of Title VII by overruling Griggs and effectively repealing §703(a)(2)'s prohibition of arbitrary practices that have the effect of depriving minorities or women of employment opportunities.

Amici also submit that the first and third questions presented in the petition for certiorari are not actually presented by the facts of this case, and that the Court should not attempt to resolve those questions on this record.

#### ARGUMENT

#### I. TITLE VII, BY ITS TERMS, PROHIBITS DISPARATE IMPACT DISCRIMINATION AS WELL AS DISPARATE TREATMENT DISCRIMINATION.

The individual disparate treatment model of McDonnell Douglas, which the Solicitor General would extend to disparate impact cases, was developed to analyze claims of intentional discrimination against individual plaintiffs under §703(a)(1) of Title VII. See McDonnell Douglas, 411 U.S. at 676-77. "A disparate impact claim," on the other hand, "reflects the language of §703(a)(2)." Teal, 457 U.S. at 448.

The two subparts of §703(a) state:

It shall be an unlawful employment practice for an employer:

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a). This statutory language establishes a comprehensive framework embracing both forms of employment discrimination: disparate treatment and disparate impact.

The Court has applied §703(a)(1) in a variety of circumstances involving

intentional discrimination. See e.g., McDonnell Douglas (individual disparate treatment); Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (direct evidence of a policy of disparate treatment); Teamsters (pattern or practice of disparate treatment). The Court, however, has "not decide[d] whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of §703(a)(1)." Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977).<sup>2</sup>

The separate and distinct objective of Congress in enacting §703(a)(2) "is plain from the language of the statute."

---

<sup>2</sup>Several lower courts have held that disparate impact challenges may also be brought under §703(a)(1). See, e.g., Colby v. J.C. Penney Co., 811 F.2d 1119, 1127 (7th Cir. 1987); Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

Griggs, 401 U.S. at 429. Section 703(a)(2) "speaks, not in terms of jobs and promotions, but in terms of limitations and classifications that would deprive any individual of employment opportunities." Teal, 457 U.S. at 449 (original emphasis).

A disparate impact claim reflects the language of §703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." [Griggs,] 401 U.S. at 429-430 (emphasis added).

Id. (original emphasis). See Satty, 434 U.S. at 141 (ruling that denial of pregnancy benefits is permissible under §703(a)(1) "does not allow us to read §703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities").

"Proof of discriminatory motive . . . is not required," Teamsters, 431 U.S. at 335 n.15, by the terms of §703(a)(2). As then-Justice Rehnquist put it, "Griggs held that a violation of §703(a)(2) can be established by proof of a discriminatory effect." Satty, 434 U.S. at 144.

II. THE LEGISLATIVE HISTORY OF TITLE VII, THE 1972 AMENDMENTS, AND THE UNIFORM ADMINISTRATIVE INTERPRETATION OF THE STATUTE DEMONSTRATE THAT THE EVIDENTIARY STANDARDS ARTICULATED IN GRIGGS AND ITS PROGENY ARE CONSISTENT WITH THE INTENT OF CONGRESS.

- A. In Enacting §703(a)(2) In 1964, Congress Specifically Intended To Prohibit "Institutionalized" Disparate Impact Discrimination Not Motivated By Any Discriminatory Purpose.

The 1964 legislative history confirms this Court's assessment of Title VII seven years later in Griggs, 401 U.S. at 429-30, that: "The objective of Congress in the enactment of Title VII . . . was to



achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," whether those barriers were erected by intentional, racially motivated discrimination or by unjustified practices with a disparate impact.<sup>3</sup> Congress did not see disparate impact discrimination as another form of disparate treatment discrimination, but rather as a separate evil which Title VII separately addressed.

The forerunner of §703(a)(2) was contained in House and Senate bills introduced in the 88th Congress, from

---

<sup>3</sup>See Rose, Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?, 25 San Diego L.R. 63, 73-81 (1988) (author was chief of the section of the Department of Justice's Civil Rights Division responsible for enforcement of Title VII).

which Title VII of the omnibus Civil Rights Act of 1964 eventually emerged. Section 5(a)(2) of H.R. 405, which was favorably reported in H.R. Rep. No. 88-570 (1963), prohibited the limitation, segregation, or classification of employees "in any way which would deprive or tend to deprive any person of employment opportunities or otherwise adversely affect his status as an employee" because of prohibited discrimination. Id. at 8.

The House Committee reported that discrimination in employment was "a pervasive practice" throughout the country and that it "permeate[d] the national social fabric -- North, South, East and West." Id. at 2.

. . . Job discrimination is extant in almost every area of employment and in every area of the country. It ranges in degrees from patent absolute rejection to more subtle forms of invidious

distinctions. Most frequently, it manifests itself through relegation to "traditional" positions and through discriminatory promotional practices.

Id. The House report attributed high minority unemployment and underemployment in part to such discriminatory practices.

Id. Opponents of the bill attacked the breadth of the prohibition.<sup>4</sup> However, with the addition of sex as one of the prohibited bases for unlawful employment practices, H.R. 405 passed without any amendment of this substantive provision.

In the Senate, language similar to §703(a)(2) appeared in S. 1937, a bill introduced by Senator Humphrey, who was later the floor manager for the omnibus

---

<sup>4</sup>H.R. Rep. No. 88-570 at 110-11 (minority view of Reps. Poll and Crammes.)

Civil Rights Act of 1964.<sup>5</sup> The bill was reported favorably out of the Senate Labor Committee on February 4, 1964. S. Rep. No. 88-867 (1964). Section 4(a) of S. 1937 made unlawful the discriminatory denial of "equal employment opportunity," including any practice which "results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidents of employment for which he is otherwise qualified." Id. at 24. The Senate report, written by Senator Clark, who was later the bipartisan floor leader for Title VII, explained that:

Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures

---

<sup>5</sup>Senators Clark and Case, who were later the bipartisan Senate floor leaders for Title VII, were co-sponsors.

operate together with widespread built-in administrative processes through which nonwhite applicants are automatically excluded from job opportunities. Channels for job recruitment may be traditionally directed to sources which by their nature do not include nonwhites; trainees may be selected from departments where Negroes have never worked; promotions may be based upon job experience which Negroes have never had.

As Secretary of Labor Wirtz stated in his testimony before the committee:

Discrimination has become, furthermore, institutionalized so that it obtains today in some organizations and practices and areas as the product of inertia, preserved by forms and habits which can best be broken from the outside.

Id. at 5. According to the Committee, S. 1937 defined "equal employment opportunity in broad terms to include a wide range of incidents and facilities, and encompassed all aspects of discrimination in employment because of race, color, religion, or national

origin." Id. at 10. The report declared that the substantive provision was "designed specifically to reach into all of the institutionalized areas and recesses of discrimination, including the so-called built-in practices preserved through form, habit or inertia." Id. at 11. See also, Hearings on Equal Employment Opportunity Before the Subcommittee on Employment of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. 144-45 (1963) (remarks of Sen. Humphrey).

Senator Humphrey, as principal floor manager, introduced the omnibus bill that contained Title VII, H. 7512, on the floor of the Senate on March 30, 1964. 110 Cong. Rec. 6307. While the omnibus bill opted for court enforcement as opposed to the administrative cease-and-desist authority proposed in the Labor Committee



bill, the substantive focus of §703(a)(2) -- the broad prohibition of practices resulting in the denial of employment opportunities -- remained the same. In explaining the bill, Senator Humphrey stated that, "at the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments. . . . The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* at 6547, 6548.

The language of §703(a)(2) passed both houses intact.

- B. In Amending Title VII, In 1972, Congress Ratified The §703(a)(2) Evidentiary Standards Articulated In Griggs.

As the Court concluded in Teal, "[t]he legislative history of the 1972

amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate impact analysis employed by the Court in Griggs." 457 U.S. at 447 n.8.<sup>6</sup> The Court explained that "[b]oth the House and Senate reports cited Griggs with approval, the Senate report noting that:

'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts

---

<sup>6</sup>The legislative history of the 1972 amendments is relevant here because those amendments extended the protection of §703(a)(2) to "applicants for employment" (such as the respondents in the present case) as well as employees, and because the amendments extended the coverage of Title VII to federal and state employees. §§701(a), (b), and (e), 42 U.S.C. §§2000e-(a), (b), and (e); §717, 42 U.S.C. §2000e-16. See Teal, 457 U.S. at 447 n.8; Franks v. Bowman Transportation Co, 424 U.S. 747, 764 n.21 (1976); see also, *id.* at 796 n.18 (Powell, J., concurring in part and dissenting in part); Albemarle, 422 U.S. at 420-21; Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). Compare Teamsters, 431 U.S. at 354 n.39 (1972 legislative history entitled to little if any weight in construing §703(h), which was unaffected by 1972 amendments).

familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs."

Id. (quoting S. Rep. No. 92-415 at 5 (1971)). See also H.R. Rep. No. 92-238 at 8 (1971).

Congress in 1972 reiterated in even stronger terms than in 1964 that Title VII prohibited disparate impact discrimination as well as disparate treatment discrimination. Indeed, congressional recognition that "institutional" discrimination was a far more evil different from discrimination motivated by ill will or animus was the impetus for several of the more significant amendments.<sup>7</sup> [here

<sup>7</sup>Senator Dominick, who sponsored the Nixon Administration's court-enforcement approach as an alternative to the proposal to give EEOC cease-and-desist powers, stated that "most discriminatory treatment is institutional; subtle practices that leave minorities at a disadvantage." 118 Cong. Rec. 697 (1972) (quoting Wall Street Journal article).

discrimination is institutional, rather than merely a matter of bad faith, . . . corrective measures appear to be urgently required." S. Rep. No. 92-415 at 14.<sup>8</sup>

See also 118 Cong. Rec. 944-45 (1972) (remarks of Sen. Sparkman) ("a significant part of the problem today is not the simple, willful act of some employer but rather the effect of long-established practices or systems in which there may be intent to discriminate or even knowledge that such is the effect").

<sup>8</sup>Congress in 1972 extended Title VII to federal employees, who previously could invoke only Civil Service Commission administrative remedies. This change was necessary because the Commission had erroneously "assume[d] that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals," and "ha[d] not fully recognized that the general rules and procedures that it had promulgated may in themselves constitute systemic barriers to minorities and women." S. Rep. No. 92-415 at 14; see also, H.R. Rep. No. 92-238 at 24. Title VII was extended to state employees for similar reasons. See H.R. Rep. No. 92-238 at 17 ("widespread discrimination against minorities exists in state and local government employment and . . . the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices").

In ratifying Griggs, Congress understood that such institutional practices could be justified only if the employer discharged a heavy burden of showing "overriding" business necessity. The House report summarized Griggs as holding that "employment tests, even if valid on their face and applied in a non-discriminatory manner, were invalid if they tended to discriminate against minorities and the company could not show an overriding reason why tests were necessary." H.R. Rep. No. 92-238 at 21 (emphasis added); see also id. at 22 ("If the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex or national origin, the employer must show an overriding business necessity to justify use of the

test"); id. at 8 ("showing of an overriding business necessity for the use of such action").<sup>9</sup>

Finally, in language "that could hardly be more explicit," Franks, 424 U.S. at 764 n.21, the section-by-section analyses submitted to both houses "confirm[ed] Congress' resolve to accept prevailing judicial interpretation regarding the scope of Title VII." Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 470 (1986). See 118 Cong. Rec. 7166, 7564 (1972) ("present case law as developed by the courts would continue to

---

<sup>9</sup>Congress did not consider the employer's burden to be merely that of articulating a legitimate reason for engaging in practices that systematically excluded minorities or women. Id. Senator Dominick, for instance, explained that under Griggs, "employment tests, even if fairly applied are invalid if they have a discriminatory effect and can't be justified on the basis of business necessity." 118 Cong. Rec. 697 (1972) (citation omitted) (emphasis added).



govern the applicability and construction of Title VII"). As the Court concluded in Teal, Congress made an explicit statement "that in any area not addressed by the amendments, present case law -- which as Congress had already recognized included our then recent decision in Griggs -- was intended to continue to govern." 457 U.S. at 447 n.8.

C. The Evidentiary Standards Of Griggs And Its Progeny Have Been Uniformly Confirmed By Administrative Interpretations Of §703(a)(2).

The Court's construction of §703(a)(2) in Griggs is "confirmed by the contemporaneous interpretations of . . . both the Justice Department and the EEOC, the two federal agencies charged with enforc[ement responsibility]." Local 28, 478 U.S. at 465-66. The enforcement agencies' administrative guidelines on this subject have been construed as

"express[ing] the will of Congress." Griggs, 401 U.S. at 434; see Albemarle, 422 U.S. at 431.<sup>10</sup>

In guidelines initially adopted in 1966 and elaborated in 1970, see Griggs, 401 U.S. at 434 n.9, the EEOC interpreted §703(a)(2) as prohibiting the use of any test or other selection technique that was discriminatory in operation unless the employer could establish job-relatedness.<sup>11</sup> These guidelines, as

---

<sup>10</sup>Because the guidelines are consistent with the statutory language and the legislative history, they are "entitled to great deference." Albemarle, 422 U.S. at 431; Griggs, 401 U.S. at 433-34; see also Local 28, 478 U.S. at 465-66; Local 93, Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986). Cf. General Electric Co. v. Gilbert, 429 U.S. 125, 141-45 (1976) (EEOC guidelines on sex discrimination not followed because they contradicted agency's earlier positions and were inconsistent with Congress' plain intent); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-94 (1973).

<sup>11</sup>EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334 (1970), codified at 29 C.F.R.

revised by the EEOC in 1970 prior to the Court's 1971 decision in Griggs, treated disparate impact discrimination as an evil separate from disparate treatment, and they interpreted Title VII as prohibiting both forms of discrimination.

The principle of disparate or unequal treatment must be distinguished from the concepts of validation. A test or other employee selection standard--even though validated against job performance in accordance with the guidelines in this part -- cannot be imposed upon any individual or class protected by Title VII where other employees, applicants or members have not been subject to that standard.

35 Fed. Reg. at 12336 (29 C.F.R. §1607.11).<sup>12</sup>

---

§§1607.3, 1607.13 (1970) (elaborating EEOC Guidelines on Employment Testing Procedures, reprinted in CCH Empl. Prac. Guide ¶16,904 (1967)).

<sup>12</sup>The Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978), codified at 29 C.F.R. §1607 (1986) -- which superseded the EEOC Guidelines and were adopted by the EEOC, the Department of Justice, and other agencies

### III. THE SEPARATE EVIDENTIARY ANALYSES DEVELOPED BY THE COURT REFLECT THE DISTINCT NATURE OF THE DISCRIMINATORY PRACTICES CONGRESS INTENDED TO PROSCRIBE IN §§703(a)(1) AND 703(a)(2).

Nothing on the face of the statute or in its legislative history supports the Solicitor General's argument that the §703(a)(1) evidentiary standards of McDonnell Douglas should supplant the §703(a)(2) evidentiary standards of Griggs. Indeed, this Court has developed different standards precisely because it is necessary to take into account the

---

in 1978 -- similarly require the application of disparate impact analysis to "any selection procedure" and embrace the evidentiary standards of Griggs. See 29 C.F.R. §1607.3 Like the EEOC Guidelines, the Uniform Guidelines separately prohibit both unjustified disparate impact and disparate treatment in the use of selection procedures. See 29 C.F.R. §1607.11 ("The principles of disparate or unequal treatment must be distinguished from the concepts of validation").

distinctions among various kinds of disparate treatment cases as well as the basic distinction between disparate treatment discrimination and disparate impact discrimination. Moreover, with respect to the separate disparate treatment and disparate impact analyses, the Court has ruled that "[e]ither theory may, of course, be applied to a particular set of facts," Teamsters, 431 U.S. at 335 n.15, not that the two analyses are functionally indistinguishable.

A. The Court Has Articulated Evidentiary Standards For Analyzing Disparate Treatment Claims Under Section 703(a)(1).

The Court has articulated several methods of analyzing disparate treatment claims under §703(a)(1). The proper analysis varies depending upon the nature of the claims and the evidence presented in each case.

1. Individual Disparate Treatment.

The McDonnell Douglas model for individual disparate treatment cases is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination," Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981), when direct evidence of discrimination is absent. Thurston, 469 U.S. at 121. Under the individual disparate treatment analysis, the plaintiff must establish a prima facie case through circumstantial evidence -- by showing, for example, that he or she belongs to a group protected by Title VII; that he or she applied and was qualified; that the application was rejected; and that the position remained open after the rejection. McDonnell Douglas, 411 U.S. at 802. "The prima facie case . . . eliminates the most



common non-discriminatory reasons for the plaintiff's rejection . . . [and] raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Burdine, 450 U.S. at 253-55 (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)).

A prima facie case of individual disparate treatment, however, is "insufficient to shift the burden of proving a lack of discriminatory intent to the defendant." Watson 108 S. Ct. at 2793 (Blackmun, J., concurring in part and concurring in the judgment) (original emphasis). Such a prima facie showing merely shifts to the employer the burden of producing admissible evidence that the plaintiff was rejected for a legitimate,

nondiscriminatory reason, thereby rebutting the presumption and raising a genuine issue of fact as to whether the employer discriminated against the plaintiff. Burdine, 450 U.S. at 254-55. As a result, the employer "frames[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id.

## 2. Direct Evidence of Intentional Discrimination.

"[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Thurston, 469 U.S. at 121; see Teamsters, 431 U.S. at 358 n.44. Where plaintiff's direct evidence of discrimination is accepted, an employment practice is established as "discriminatory on its face" without further need to show a

discriminatory intent. Thurston, 469 U.S. at 121 (policy conditioning transfer rights on age of airline captains is discriminatory on its face under the Age Discrimination in Employment Act); Manhart, 435 U.S. at 708 (policy requiring female employees to make larger contributions to pension fund than male employees' is discriminatory on its face under §703(a)(1)); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (policy of hiring men but not women with pre-school age children is discriminatory on its face under §703(a)(1)).

Where plaintiffs' direct evidence establishes disparate treatment, the burden shifts to the employer to justify the practice by proving the applicability of any statutory immunities or affirmative defenses. See Thurston, 469 U.S. at 122-

25 (rejecting employer's statutory bona fide occupational qualification and bona fide seniority system defenses); Manhart, 435 U.S. at 716-17 (rejecting cost justification defense as unavailable in a disparate treatment case); Phillips, 400 U.S. at 544 (remanding for evidence on bona fide occupational qualification defense).

### 3. Pattern or Practice of Intentional Discrimination.

In class actions and other cases involving claims of widespread intentional discrimination against members of a race, sex, or ethnic group, statistical or other evidence of a "pattern or practice" of disparate treatment is sufficient to establish a prima facie violation in the absence of direct evidence of intentional discrimination. Teamsters, 431 U.S. at 360; Franks, 424 U.S. at 751. "The burden

then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that [plaintiffs'] proof is either inaccurate or insignificant." Teamsters, 431 U.S. at 360. See also Hazelwood School District v. United States, 433 U.S. 299, 310 (1977). If the employer fails to rebut the prima facie case, the court concludes that a violation has occurred and enters appropriate classwide declaratory and injunctive relief without hearing further evidence. Teamsters, 431 U.S. at 361.

B. The Court Has Articulated Separate Evidentiary Standards For Analyzing Disparate Impact Claims Under Section 703(a)(2).

In enacting §703(a)(2), "Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis

of racial or other impermissible classification.'" Dothard v. Rawlinson, 433 U.S. 321, 328 (1977) (quoting Griggs, 401 U.S. at 431).

The gist of [a §703(a)(2)] claim . . . does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualifications work in fact disproportionately to exclude women from eligibility for employment. . . . [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.

Since it is shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in 'efficient and trustworthy workmanship,'



Albemarle Paper Co. v. Moody, 422 U.S. at 425 quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801.

Dothard, 433 U.S. at 329-30.<sup>13</sup>

When a plaintiff proves that a facially neutral practice has significant adverse impact, the plaintiff has established the very conduct that §703(a)(2) prohibits. Watson, 108 S. Ct. at 2794 (Blackmun, J., concurring in part and concurring in the judgment) ("unlike a claim of intentional discrimination, which the McDonnell Douglas factors establish only by inference, the disparate impact caused by an employment practice is

---

<sup>13</sup>This analysis is typically used in class actions under Rule 23, Fed. R. Civ. P., and government pattern or practice actions under §707 of Title VII, 42 U.S.C. §2000e-6, because disparate impact discrimination is by its nature broadly applicable to a group. However, the analysis has also been utilized in cases seeking relief only for individual plaintiffs. See, e.g., Teal, 457 U.S. at 442-44; Lowe v. City of Monrovia, 775 F.2d 998, 1004 (9th Cir. 1985).

directly established by the numerical disparity"); see Satty, 434 U.S. at 144 ("Griggs held that a violation of §703(a)(2) can be established by proof of a discriminatory effect"). Similarly, in both the direct evidence (Thurston) and pattern or practice intentional discrimination (Teamsters) models, the prima facie case directly establishes the discrimination prohibited by §703(a)(1). The direct evidence and pattern or practice models, like the disparate impact model, were developed for analyzing evidence concerning employment practices and policies that affect large numbers of people on a classwide basis.

The McDonnell Douglas individual disparate treatment model, on the other hand, was developed to analyze the very different kinds of evidence typically presented in a case involving a discrete

act of intentional discrimination against a single individual. A prima facie showing in a McDonnell Douglas case is not comparable in either its nature or its effect to a prima facie showing in a Griggs disparate impact case. A McDonnell Douglas prima facie case does not in itself establish the intentional discrimination prohibited by §703(a)(1); it only "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." Burdine, 450 U.S. at 255; see Teamsters, 431 U.S. at 358 n.44.

This Court has uniformly held that, once the plaintiff establishes a prima facie disparate impact case under §703(a)(2), the burden shifts to the employer to prove that the challenged practice is justified. See, e.g., Teal, 457 U.S. at 446 ("employer must . . .

demonstrate that any given requirement [has] a manifest relationship"); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (prima facie case "rebutted by [employer's] demonstration that its narcotics rule . . . 'is job related'"); Dothard, 433 U.S. at 329 (employer must "prov[e] that the challenged requirements are job related"); Albemarle, 422 U.S. at 425 (employer has "burden of proving that its tests are 'job related'"); Griggs, 401 U.S. at 431, 432 ("The touchstone is business necessity"; "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); see also Watson, 108 S. Ct. at 2794 (Blackmun, J., concurring in part and concurring in the judgment).

While it is true that an evidentiary burden may be either one of persuasion or one of production, this Court in Title VII disparate impact cases has always imposed on the employer the burden to persuade the trier of fact of its justification for using practices that have a discriminatory impact. Indeed, as petitioners here concede, see Brief for Petitioners at 42, the employer has the burden of demonstrating business necessity as an "affirmative defense to claims of violation" of §703(a)(2). Guardians Association v. Civil Service Commission, 463 U.S. 582, 598 (1983) (White, J., announcing the Court's judgment and delivering an opinion joined by Rehnquist, J.) (Title VI case).

In trying to force the Griggs analysis into the McDonnell Douglas formula, the Solicitor General ignores the

Court's repeated admonitions that McDonnell Douglas does not provide the proper model for analyzing all Title VII claims.<sup>14</sup> In an individual disparate treatment case, it is appropriate to impose a minimal burden of production on the employer because the plaintiff's prima facie showing is itself "not onerous," Burdine, 450 U.S. at 253, and does not in itself establish a violation of §703(a)(1). That same slight burden would be inappropriate in a disparate impact case, where the prima facie showing usually includes substantial statistical

---

<sup>14</sup>See, e.g., McDonnell Douglas, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from the complainant in this case is not necessarily applicable in every respect to differing factual situations"); Teamsters, 431 U.S. at 358 ("Our decision in [McDonnell Douglas] . . . did not purport to create an inflexible formulation"); Furnco, 438 U.S. at 575 (McDonnell Douglas formulation "was not intended to be an inflexible rule").



evidence of adverse impact and constitutes direct evidence of a violation of §703(a)(2).

C. The Griggs Disparate Impact Analysis Is Analogous To The Teamsters And Thurston Disparate Treatment Analyses.

The Solicitor General's theory fails on its own terms. If there is a need analogize disparate impact analysis to some disparate treatment mode of proof, amici submit that the Teamsters "pattern or practice" model and the Thurston "direct evidence" model provide more appropriate analogies than the McDonnell Douglas "individual case" model. In the Teamsters and Thurston models, the allegedly discriminatory conduct is not a single, isolated decision affecting only one individual, but rather a broadly applicable practice of intentional discrimination affecting a class as a

whole. The purpose of these analyses is comparable to the purpose of the disparate impact model, with its parallel focus on "artificial, arbitrary, and unnecessary barriers to employment." Griggs, 401 U.S. at 431. In the Solicitor General's terms, classwide disparate treatment discrimination is the "functional equivalent" of disparate impact discrimination.

Because of the similarity in the practices analyzed, the evidentiary models are also similar. In the Teamsters and Thurston models, plaintiffs establish a prima facie case by introducing statistical or other evidence of a "standard operating procedure" of classwide disparate treatment, Teamsters, 431 U.S. at 336, or by proving the classwide application of a facially discriminatory policy. Thurston, 469 U.S.

at 121. In the Griggs disparate impact model, plaintiffs establish a prima facie case by marshalling comparable evidence of a practice affecting an entire class of employees or applicants. Moreover, in the Teamsters and Thurston disparate treatment models, as in the Griggs disparate impact model, proof of a prima facie case shifts the burden of persuasion, not the burden of production, to the employer. See Teamsters, 431 U.S. at 360; Thurston, 469 U.S. at 122-25. In all three models, plaintiff has borne his burden of proof to establish a violation of Title VII; defendant then has the burden of proving a justification, establishing what is, in essence, an affirmative defense.

In short, there is no need to change the Griggs disparate impact analysis to make it conform to the appropriate disparate treatment analysis. Existing

evidentiary standards for analyzing disparate impact discrimination are already closely analogous to the evidentiary standards for analyzing disparate treatment discrimination under Teamsters and Thurston.

#### IV. OVERRULING THE EVIDENTIARY STANDARDS OF GRIGGS AND ITS PROGENY WOULD BE CONTRARY TO THE REMEDIAL PURPOSE OF TITLE VII.

The Solicitor General argues, in essence, that Griggs and its progeny should be overruled in order to make the employer's burden in a Griggs disparate impact case conform to the employer's burden in a McDonnell Douglas individual disparate treatment case. Overruling the Court's prior decisions in this manner, however, would drastically alter the nature of disparate impact analysis under §703(a)(2). The employer's burden would be reduced to such an extent that all but

the most unimaginative employers -- unable even to articulate a legitimate reason for practices having a significant adverse impact -- would be able to rebut a showing of disparate impact discrimination, no matter how compelling. The result would be an effective repeal of §703(a)(2).

The Court in Griggs identified Title VII's fundamental purpose as "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431. The statute "police[s]" not only the problem of intentional discrimination through the disparate treatment analyses available under §703(a)(1), but also "the problem of subconscious stereotypes and prejudices," Watson, 108 S. Ct. at 2786 (part IIB), and "built-in practices preserved through

form, habit or inertia." S. Rep. No. 83-867 at 11. The latter purpose derives from the terms of §703(a)(2) and, as Congress recognized, is enforced by application of the disparate impact analysis articulated in Griggs. The Solicitor General's proposal to overrule the evidentiary standards of Griggs and its progeny is contrary to Title VII's fundamental purpose.

The Solicitor General would have the Court transmute the employer's burden of persuasion in a Griggs disparate impact case into the burden of production imposed on an employer in a McDonnell Douglas individual disparate treatment case -- a feat of judicial alchemy that would drastically change the nature of disparate impact analysis under §703(a)(2). The employer's burden in such cases of proving an "overriding business necessity," as



Congress termed it, is appropriately high because the challenged practice has been shown to violate §703(a)(2) as a prima facie matter. The Solicitor General's proposed standard, in contrast, would declare such practices lawful whenever the employer could simply articulate a "legitimate, nondiscriminatory reason" for its actions; the employer "need not [even] persuade the court that it was actually motivated by the proffered reason[ ]." Burdine, 450 U.S. at 254. The Solicitor General would then permit the plaintiff to introduce contrary evidence, but would put the risk of nonpersuasion of business necessity on the plaintiff. Failing this, all the plaintiff then could do to abate the exclusionary practice would be to present evidence of alternative selection devices. As a result, the plaintiff would have not only the burden of proving a

prima facie case of disparate impact, but also the burden of disproving business necessity.

The scheme proposed by the Solicitor General would thwart the specific remedial purpose of §703(a)(2) by ~~making it~~ virtually impossible for a plaintiff to prevail on a claim of disparate impact discrimination. As a practical matter, §703(a)(2) would be repealed as an independent substantive provision, and the evils to which that provision is addressed -- "the problem of subconscious stereotypes and prejudices" and "built-in practices preserved through form, habit or inertia" -- would go unremedied.

Ignoring that the Griggs disparate impact standard directly reflects statutory language and congressional will, the Solicitor General attempts to justify its revision by raising the specter of

quotas and intrusion on managerial prerogatives. See Brief for the United States as Amicus Curiae at 25. Griggs itself rejected such claims, 401 U.S. at 436, as did Congress when it ratified Griggs in 1972.<sup>15</sup>

Moreover, the suggestion that subjective selection procedures are impossible to validate<sup>16</sup> is simply wrong. The courts have identified specific characteristics of valid subjective rating procedures, such as using specific guidelines for raters, rating only

---

<sup>15</sup> Congressional opponents specifically objected to the 1972 amendments on these grounds, but their views were not accepted. E.g., 117 Cong. Rec. 32108 (1971) (comments of Rep. Rarick that bill would require preferential treatment and maintenance of racial balance); 117 Cong. Rec. 38402 (1971) (comments of Sen. Allen that bill would infringe on discretion of state and local officials to select employees).

<sup>16</sup> See Brief for the United States as Amicus Curiae at 25 n.35; Brief for Petitioners at 47.

observable behaviors or performance, requiring raters to have knowledge of job responsibilities, and using an evaluative device with fixed content that calls for discrete judgments.<sup>17</sup> Subjective selection procedures can be and have been successfully validated.<sup>18</sup> See Rose, Subjective Employment Practices, 25 San Diego L. Rev. at 87-92.

---

<sup>17</sup> See B. Schlei & P. Grossman, Employment Discrimination Law 202-05 (2d ed. 1983) (collecting cases).

<sup>18</sup> See, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 362 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981) (interview and training simulations); Wade v. Mississippi Coop. Extension Serv., 615 F. Supp. 1574 (N.D. Miss. 1985) (promotional performance evaluation); Tillery v. Pacific Tel. Co., 34 FEP Cases 54 (N.D. Cal. 1982); Wilson v. Michigan Bell Tel. Co., 550 F. Supp. 1296 (E.D. Mich. 1982) (formal assessment procedures).

V. THE FIRST AND THIRD QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI ARE NOT PRESENTED BY THE FACTS OF THIS CASE.

With respect to the first question presented in the petition (concerning the standards for establishing a prima facie case of disparate impact) and the third question presented (concerning the application of disparate impact analysis to multicomponent selection practices), amici rely on respondents' brief. However, as we briefly explain, it appears that neither question is actually presented by the record before the Court.

As to the first question, petitioners argue that the Ninth Circuit's reliance upon statistics comparing cannery with noncannery positions is erroneous because there was no showing of an internal promotion system. Such statistics would be marshalled as evidence of promotional discrimination where an employer maintains

an internal promotion system in which lower level employees are the selection pool for upper level positions. See, e.g., Paxton v. Union National Bank, 688 F.2d 552, 564 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983). However, petitioners err in arguing that comparative statistics can be used only where there are internal promotions.

In this case, plaintiffs challenged, on both disparate impact and disparate treatment grounds, several specific hiring practices -- nepotism, subjectively evaluated selection criteria, separate hiring channels and word of mouth recruitment, a rehire preference, and a series of related practices involving race labeling, housing and messing. Plaintiffs presented independent statistical or other evidence that each of these specific practices had a significant adverse impact



on minority class members. Except for the rehire preference, the district court erroneously failed to consider the challenge under, or erred in applying, the disparate impact standard. See App. Cert. VI-19-VI-39; see also, Brief for the United States as Amicus Curiae at 20 ("The district court did not apply disparate impact analysis to the selection of noncannery workers generally, and there is therefore no finding that respondents' statistics did not make out a prima facie case under the disparate impact model"). The Ninth Circuit, therefore, properly remanded these issues to the district court.

The comparative statistics to which petitioners object were not relied upon as the sole evidence of the disparate impact of the challenged practices. The Ninth Circuit upheld the use of these

comparative statistics on the limited ground that "such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established." App. Cert. VI-16. The comparative statistics, which do not appear strictly to be necessary to establish the disparate impact of each of the challenged practices, were presented as additional evidence that "some practice or combination of practices has caused the distribution of employees by race." App. Cert. VI-18.<sup>19</sup>

---

<sup>19</sup>On the facts of this case, the Ninth Circuit correctly considered these statistics given the difficulty of establishing the available labor pool for the migrant and seasonal noncannery jobs in question, the arbitrary nature of the qualifications actually imposed for the noncannery jobs, and the fact that minority cannery workers were apparently qualified and available. The Ninth Circuit's unwillingness to rely on petitioners' generalized census data, and its reliance instead on more probative

As to the third question presented, petitioners argue that only "cumulative" evidence of the impact of several employment practices was presented. For the reasons stated above, we believe petitioners have misstated the record: Specific, identified hiring practices were challenged, and both practice-specific evidence and cumulative statistical evidence were presented below.

However, if this were a case in which a plaintiff challenged a multicomponent employment practice, the adequacy of cumulative evidence of disparate impact would depend upon particular factual circumstances. If the practice consisted of a series of sequential steps, e.g.,

---

practice-specific evidence of disparate impact coupled with respondents' comparative statistics, are understandable and proper in view of the record in this case.

Teal, 457 U.S. at 443-44 (a qualifying written examination followed by consideration of other criteria), the plaintiff might attack one or more steps, or the plaintiff might attack the process as a whole. While a plaintiff challenging one or more discrete steps in the process typically introduces evidence of the disparate impact of each challenged step, a plaintiff challenging the process as a whole is not required to introduce such evidence.<sup>20</sup>

Moreover, a plaintiff challenging a multicomponent practice in which the employer combines consideration of several factors, e.g., Teal, 457 U.S. at 444 (employees promoted from a list of

---

<sup>20</sup>See Green v. USX Corp., 843 F.2d 1511, 1524 (3rd Cir. 1988); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984). See also, 29 C.F.R. §1607.16Q (Uniform Guidelines apply to any "measure [or] combination of measures").

successful test takers based on an amalgam of work performance, recommendations and seniority), should not be required to identify and present specific disparate impact evidence as to each factor. Title VII does not prohibit discrete discriminatory criteria in the abstract, but as "actually applied." Albemarle, 422 U.S. at 433. If an employer uses an amalgam of factors as a practice, and that practice has a disparate impact, the plaintiff should not be required to go through the academic exercise of disentangling the factors in order to ascertain which particular factors caused the disparate impact of the practice as a whole. That burden should be borne by the employer.<sup>21</sup>

---

<sup>21</sup>It is the employer who presumably has an interest in distinguishing among several factors that produce a disparate impact in order to isolate the discriminatory factors and to save the

Amici respectfully submit that the first and third questions presented in the petition for certiorari are not actually presented by the facts of this case, and that those questions should not be decided on this record.

---

rest. It is the employer who may wish to conduct separate validation studies of the factors. Moreover, it is the employer who has the obligation under administrative guidelines to "maintain and have available records or other information showing which components [of a multicomponent selection procedure] have an adverse impact." Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.15(a)(2) (employers with 100 or more employees should maintain component data if overall practice has adverse impact or for two years after impact eliminated). See Brief for the United States as Amicus Curiae at 22 ("certainly if [multiple] factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, the decision may be challenged (and defended) as a whole").



CONCLUSION

The order of the Ninth Circuit remanding the case for further proceedings should be affirmed.

Respectfully Submitted,

JULIUS LEVONNE CHAMBERS  
CHARLES STEPHEN RALSTON  
RONALD L. ELLIS  
NAACP Legal Defense and  
Educational Fund, Inc.

BILL LANN LEE\*  
PATRICK O. PATTERSON, JR.  
THEODORE M. SHAW  
NAACP Legal Defense and  
Educational Fund, Inc.

ANTONIA HERNANDEZ  
E. RICHARD LARSON  
JOSE ROBERTO JUAREZ, JR.  
Mexican American Legal Defense  
and Educational Fund

RUBEN FRANCO  
KENNETH KIMERLING  
Puerto Rican Legal Defense  
and Education Fund

Counsel for Amici Curiae

\*Counsel of Record

November 1988.